

1 HON. BRENDA R. GILBERT
2 District Judge
3 Sixth Judicial District
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5 Livingston, Montana 59047
6 406-222-4130
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PARK COUNTY CLERK
OF DISTRICT COURT
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FILED
BY Ronnie Dendall
DEPUTY

9 MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

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11 PARK COUNTY ENVIRONMENTAL)
12 COUNCIL and GREATER)
13 YELLOWSTONE COALITION,)

14 Plaintiffs,)

15 vs.)

16 MONTANA DEPARTMENT OF)
17 ENVIRONMENTAL QUALITY and)
18 LUCKY MINERALS, INC.,)

19 Defendants.)
20)
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23)
24)
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CAUSE NO. DV 17-126

DECISION REGARDING CROSS-MOTIONS
FOR SUMMARY JUDGMENT
FILED BY PLAINTIFFS AND DEQ

21 Plaintiffs, Park County Environmental Council and Greater Yellowstone Coalition, filed
22 their Motion for Summary Judgment and Brief in Support of Plaintiff's Motion for Summary
23 Judgment. Defendant Montana Department of Environmental Quality filed its Cross-Motion for
24 Summary Judgment and DEQ's Brief Opposing Plaintiff's Motion for Summary Judgment and
25 Supporting DEQ's Cross-Motion for Summary Judgment. Defendant Lucky Minerals, Inc., filed
26 its Response Brief in Opposition to Plaintiff's Motion for Summary Judgment. Plaintiffs filed
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1 their Consolidated Brief in Response to Cross-Motions for Summary Judgment and Reply in
2 Support of Plaintiffs' Motion for Summary Judgment. DEQ filed its Reply Brief in Support of
3 DEQ's Cross-Motion for Summary Judgment.
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5 Plaintiffs filed Declarations of four of Plaintiffs' members and the parties have further
6 submitted excerpts from the Administrative Record, the entirety of which has been made part of
7 the record herein.

8 The Court heard oral argument regarding the Motions for Summary Judgment on April 16,
9 2018, at which time the Motions were deemed submitted.
10

11 The Court has considered the Motions for Summary Judgment, the Briefs filed in support
12 and in opposition to said motions, the Administrative Record and the other records and files herein,
13 the argument of counsel, and applicable legal authority. Good cause exists for the following
14 Decision.
15

16 **DECISION**

17 **Factual and Procedural Background**

18 This case involves the Plaintiffs' challenge of the decision made by Defendant Department of
19 Environmental Quality (hereinafter "DEQ") to grant Defendant Lucky Minerals, Inc., (hereinafter
20 "Lucky") an exploration license in the Emigrant Gulch area of the Absaroka Mountains. Plaintiffs
21 are the Park County Environmental Council and the Greater Yellowstone Coalition.
22

23 Lucky's proposal is to drill 46 exploratory holes, each up to 2,000 feet deep, at 23 locations in
24 Emigrant Gulch. AR 10, 29. Drilling would take place for nearly 24 hours a day over the course of
25 two three-month field seasons. AR 25, 29. Lights similar to those used by highway construction
26 crews would light the operation each night. AR 29. The project would require the use of a D-7
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1 bulldozer, a G-12-14 grader, a JD 50 excavator or backhoe, two LF-70 drilling machines, three diesel
2 or gas-powered water pumps, two service trucks, a four-by-four pick-up truck and two ATV's. AR
3 26.
4

5 DEQ chose to prepare an Environmental Assessment ("EA") with regard to Lucky's
6 application for an exploration license. The Draft EA was released on October 13, 2016 for public
7 comment and the DEQ issued its Final Environmental Assessment ("Final EA") on July 26, 2017,
8 concluding that the project will not have significant environmental impacts and that an
9 Environmental Impact Statement (EIS) is not required. AR 177. DEQ issued Lucky the exploration
10 license on July 26, 2017 and the Plaintiffs filed this case challenging the agency decision on
11 September 22, 2017. The cross-motions for summary judgment followed.
12

13 **The Emigrant Gulch**

14 Emigrant Gulch, the site of Lucky's proposed exploration, is within the Absaroka Mountains
15 and lies just outside the rugged and remote Absaroka-Beartooth Wilderness. AR 10, 14 (project
16 location map), 130-131. The nearly 11,000-foot high Emigrant Peak is one of the most prominent
17 mountain tops visible from the aptly named Paradise Valley, to the west. AR 1489. Emigrant Peak is
18 flanked by Emigrant Creek (the waterbody in Emigrant Gulch) on the northeast and Six Mile Creek
19 on the southwest, both of which are tributaries of the Yellowstone River. AR 14. The Absaroka
20 Mountains, including Emigrant Peak and its adjacent valleys, are home to bighorn sheep, elk, deer,
21 moose, marmots, coyotes, black bears, and wolves. AR 51, 2327. The Absarokas also provide
22 important, occupied habitat for state-listed species of concern, including wolverines and grizzly bears,
23 as well as Canada Lynx, which is a threatened species under the federal Endangered Species Act. AR
24 51-53, 62. As part of the Greater Yellowstone Ecosystem, these public lands constitute part of the
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1 largest intact natural area in the lower-48 United States. See AR 2057 (describing Greater
2 Yellowstone Ecosystem).

3 Emigrant Peak is one of the most popular year-round recreation destinations in Montana,
4 including for hiking in the summer and backcountry skiing in the winter. AR 136. For over a
5 hundred years, area residents and visitors have soaked in the natural mineral pools of Chico Hot
6 Springs, which sits at the mouth of Emigrant Gulch. AR 2934-35. The creeks in Emigrant Gulch
7 drain into the Yellowstone River, which hosts a world-renowned trout fishery. AR 2884. These
8 features and the natural beauty of the area are also important to the local economy, supporting tourism
9 that directly and indirectly employs large numbers of Park County residents. AR 176; 2883-84; 2937.
10 According to a recent economic evaluation of Park County, “[t]he chief threat to area quality of life
11 and economic well-being would be any large-scale activities that negatively impact area amenities
12 and environmental attributes that are the foundation of the area’s economic vitality.” AR 2885; AR
13 3099. The economist concluded that “[l]argescale, highly visible, and environmentally disruptive
14 activities-such as large-scale mining and heavy manufacturing – may pose the greatest threats, and
15 could lead to long-term economic impairment and future economic stagnation.” AR 2885; AR 3099.
16

17 On November 21, 2016, the U.S. Forest Service and Department of Interior announced a
18 proposal to withdraw 30,000 acres of federal land in Paradise Valley – including National Forest
19 System lands adjacent to Lucky’s proposed project – from mineral exploration and development. See
20 Notice of Application for Withdrawal and Notification of Public Meeting, 81 Fed. Reg. 83, 867 (Nov.
21 22, 2016). The proposal had the immediate effect of preventing mining activity on the National
22 Forest lands, subject to valid existing rights, for two years. Id. at 83, 867-68. If finalized, the
23 withdrawal will prevent mining activity on these lands for as many as 20 years. Id. The withdrawal
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1 is intended “to protect and preserve the scenic integrity, important wildlife corridors, and high-quality
2 recreation values of the Emigrant Crevice area located in the Custer Gallatin National Forest, Park
3 County, Montana.” Id.

4 The federal mineral withdrawal does not include the patented mining claims on which Lucky
5 now proposes mineral exploration. Id.

7 **Standard of Review**

8 This Court reviews the DEQ’s analysis and decision under MEPA to determine whether or
9 not it is “arbitrary, capricious, unlawful, or not supported by substantial evidence.” *Mont. Env’tl. Info.*
10 *Ctr. v. Mont. Dep’t of Env’tl. Quality*, 2016 MT 9, ¶ 14, 382 Mont. 102, 365 P.3d 454. Under this
11 standard, the Court determines, based on a careful review of the record, “whether the decision was
12 based on a consideration of the relevant factors and whether there has been a clear error of judgment.”
13 *Id.* An agency is required to take a “hard look” at the environmental impacts of a project or proposal.
14 *Clark Fork Coalition v. Montana DEQ*, 2008 MT 407, 197 P.3d 482, ¶47, 347 Mont. 197, ¶ 47.

15 Summary judgment is the appropriate mechanism for resolving a case where, as here, there
16 are “no genuine issues of material fact” and the moving party is entitled to judgment as a matter of
17 law. Rule 56 (c)(3), Mont. R. Civ. P. “Summary judgment is particularly appropriate where, as here,
18 the review is on the administrative record”. *Montana v. EPA*, 941 F. Supp. 945, 955 (D. Mont.
19 1996), *aff’d*, 137 F.3d 1135 (9th Cir 1998).

20 The Metal Mine Reclamation Act applies to applications for mineral exploration,
21 pursuant to § 82-4-331(1) MCA. The Legislature adopted the Metal Mine Reclamation Act
22 (MMRA) to “provide adequate remedies to prevent unreasonable depletion and degradation of
23 natural resources” consistent with the state’s obligations under the Montana Constitution’s
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1 environmental protections, Article II, Section 3 and Article IX. §82-4-301(2)(a). The
2 Legislature intended the provisions of the MMRA to “mitigate or prevent undesirable offsite
3 environmental impacts” of mineral exploration and development.” § 82-4-302(1)(g), MCA.

4 To secure an exploration license, pursuant to § 82-4-331(1)
5 MCA, an applicant shall:

6 ...
7 (c) submit an exploration plan of operations and a map or
8 sketch in sufficient detail to locate the area to be explored as
9 well as the actual proposed disturbances, and to allow the
10 department to adequately determine whether significant
11 environmental problems would be encountered. The plan of
12 operations must state the type of exploration techniques that
13 would be employed in disturbing the land and include a
14 reclamation plan in sufficient detail to allow the department
15 to determine whether the specific reclamation and
16 performance requirements of ARM 17.24.104 through
17 17.24.107 would be satisfied.

18 Pursuant to § 82-4-332(1), MCA, the DEQ must issue an exploration license to a person
19 that “agrees to reclaim any surface area damaged by applicant during exploration operations, as
20 may be reasonably required by the department.” The reclamation and performance standards are
21 specified in ARM 17.24.104 through 107.

22 In addition, the general purpose provision of the MMRA, stated at § 82-4-301(2)(a)
23 MCA is to “mitigate or prevent undesirable offsite environmental impacts.” Though specific
24 reclamation and performance standards are set forth in the pertinent ARMs, the general purpose
25 provisions do require consideration of mitigation or prevention of undesirable offsite
26 environmental impacts. The general purposes of the MMRA cannot be ignored, while the
27 specific provisions of the ARMS must be considered in connection with each of the standards
28 they address.

1 The Montana Environmental Policy Act was designed to “promote efforts that will
2 prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health
3 and welfare of humans.” § 75-1-102(2), MCA. MEPA was enacted to prevent or eliminate
4 environmental damage. *Pompeys Pillar Historical Ass’n v. Mont. Dep’t of Env’tl. Quality*, 2002
5 MT 352, ¶ 17, 313 Mont 401, 61 P.3d 148. Another express purpose of MEPA is to protect the
6 right to use and enjoyment of private property free from undue regulation. *Id.* Pursuant to § 75-
7 1-102(2) MCA, MEPA requires DEQ to “take a ‘hard look’ at the environmental impacts of a
8 given project or proposal.” *Mont. Wildlife Fed’n v. Mont Bd. Of Oil & Gas Conservation*, 2012
9 MT 128, ¶ 43, 365 Mont. 232, 280 P.3d 877; *see also* § 75-1-201(1)(b)(iv); ARM
10 17.4.609(3)(d). The DEQ must consider, among other things, reasonable alternatives to the
11 proposed action, the direct, indirect, and cumulative environmental impacts of the action, and
12 “the economic advantages and disadvantages of the proposal.” § 75-1-201(1)(b)(iv) and (v),
13 MCA; ARM 17.4.609(3). The DEQ must evaluate measures that will mitigate the project’s
14 impacts. ARM 17.04.609(3)(g). It must also “[e]xamine the relevant data and articulate a
15 satisfactory explanation for its action, including a rational connection between the facts found
16 and the choice made.” *Mont. Wildlife Fed’n*, ¶ 47, (quoting *Clark Fork Coal v. Mont. Dep’t of*
17 *Env’tl. Quality*, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482).

18
19 The DEQ must set forth its analysis in an Environmental Impact Statement (EIS) if the
20 project it is considering will “significantly affect the quality of the human environment.” ARM
21 17.4.607(1). The DEQ may approve the project without preparing an EIS only if it rationally
22 determines, through preparation of an Environmental Assessment (EA), that the project’s
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1 impacts will not be significant, or that otherwise significant impacts can be mitigated below the
2 level of significance. A.R.M.s 17.4.607(1)(b) and 17.4.607(4).

3 In determining whether the impacts of a proposed action will be significant, DEQ must
4 consider the following criteria:
5

6 (a) the severity, duration, geographic extent, and frequency of occurrence of the
7 impact;

8 (b) the probability that the impact will occur if the proposed action occurs; or
9 conversely, reasonable assurance in keeping with the potential severity of an impact
10 that the impact will not occur;

11 (c) growth-inducing or growth-inhibiting aspects of the impact, including the
12 relationship or contribution of the impact to cumulative impacts;

13 (d) the quantity and quality of each environmental resource or value that would be
14 affected, including the uniqueness and fragility of those resources or values;

15 (e) the importance to the state and to society of each environmental resource or value
16 that would be affected;

17 (f) any precedent that would be set as a result of an impact of the proposed action that
18 would commit the department to future actions with significant impacts or a decision
19 in principle about such future actions; and

20 (g) potential conflict with local, state, or federal laws, requirements, or formal plans.

21 A.R.M. 17.4.608(1)

22 In order to demonstrate that an EIS is required, a plaintiff challenging an agency
23 decision, "need not show that significant effects will in fact occur, but if the plaintiff raises
24 substantial questions whether a project may have a significant effect, an EIS must be prepared."

25 *Ravalli Cty. Fish & Game Ass'n*, 273 Mont. At 379, 903 P.2d at 1368. Where an uncertain
26 impact of an agency action is potentially severe, DEQ may not deem it insignificant without
27 "reasonable assurance...that the impact will not occur." ARM 17.4.608(1)(b)
28

Evaluation of Potential Impact to Wildlife

In the Draft EA, DEQ concluded that the road improvements attendant to the mineral exploration project would provide easier motor vehicle access into the Emigrant Creek drainage, causing harm to wildlife residing there:

Improvements to the roads would lead to easier vehicle and human access to higher elevations and more remote habitat. Wildlife populations that are subjected to hunting and trapping may sustain higher mortalities as a result of better access (Jalkotzy et. al., 1997) . . . Further, because of the increased human presence under the Proposed Action, the harassment or poaching of wildlife may also increase.

AR 442.

The Draft EA predicted that improved access could be "detrimental" because "an increase in human disturbance may cause" female wolverines to abandon their dens." AR 445. The Record reflects the following regarding the Emigrant Gulch access road:

1. It is impassable to most passenger vehicles due to rockfall and other hazards.
(AR 6632)
2. The existing road is comparable to a Jeep trail. (AR 3009-10)
3. "The lower portion of the road is not passible with hwy vehicles." (AR 6634)

The significance of the current state of the Emigrant Gulch access road is that Lucky proposes to make the road accessible to its equipment by grading, clearing rock and other debris from the road surface, and sloping the road to enhance draining and present channeling. AR 26. These improvements will "facilitate access for motorized use." (AR 2983).

Fish Wildlife & Parks (FWP) commented on the Draft EA, as follows:

There is cause for concern over permanent changes to wildlife habitat that would result from the proposed road

1 improvements, included in both the proposed Action and
2 Agency Modified Alternative. . .The road improvements will
3 facilitate access for motorized use in an area that presently is
4 very remote and rarely disturbed. This will result in a
5 potentially significantly increased level of disturbance and
6 fragmentation of the habitat with higher traffic volume,
7 higher traffic speeds, and increased human presence. The
8 road improvements would represent a permanent change to
9 the landscape, with long-term implications for habitat
10 suitability and productivity of the area for wildlife. This is of
11 greatest concern for those species that are most sensitive to
12 human activity, such as wolverine, lynx, grizzly bears, and
13 ungulates including elk, mule deer and moose that use this
14 habitat for calving/fawning or migration.

15 AR 2983.

16 Numerous scientific studies that are part of the Administrative Record conclude that
17 increased human development and activity in once remote areas would have a negative impact on
18 wolverines. AR 2601; AR 1211-1912; AR 2535. Wolverines are already scarce in the Yellowstone
19 region and wolverine populations are highly sensitive to habitat alteration. AR 2619; AR 2305; AR
20 2575.

21 Grizzly bear populations are also affected by the creation of human access into prime bear
22 habitat. Increased bear mortality rates caused by improved access is a major concern for grizzly
23 bear conservation. AR 2141-2142; AR 1908-1910 AR 2116. The proposed action, "increases the
24 potential for human/bear conflicts to occur, possible leading to injury, direct harm, or secondary
25 mortality of grizzly bears- as well as risks to human safety, particularly during the critical fall
26 season." AR 73.

27 Plaintiffs argue that that the DEQ illogically abandoned its conclusion in the Draft EA that
28 the proposed project would be detrimental to wildlife when it issued the Final EA. The Final EA
states that, "DEQ has re-evaluated the impact on wildlife resulting from the proposed road

1 improvements and believes that the draft EA overstated the impacts.” Plaintiffs argue that the DEQ
2 offered “no reasoned analysis whatsoever in support of its conclusion—which is in direct conflict
3 with the conclusion. . . of its sister agency, FWP.” citing *W. Watersheds Project v. Kraayenbrink*,
4 632 F.3d 472, 492-493 (9th Cir. 2011).
5

6 Lucky argues that Plaintiffs’ assertion that modifications to the road will make it accessible
7 by ordinary passenger vehicles is not supported by the record. Accordingly, Lucky takes issue with
8 any of the Plaintiffs’ concerns that stem from increased access to the area.
9

10 DEQ responds to Plaintiffs claims by admitting that it revised its analysis in the Final EA to
11 acknowledge a marginal increase in access to the area and a marginal increase in impacts to
12 wildlife. The Final EA states that:

13 The public has no access to the base of the St. Julian Claim
14 Block via Emigrant Creek Road. Therefore, the
15 improvements to Emigrant Creek Road discussed above
16 would not lead to access to higher elevations and more
17 remote habitat than existed before. The removal of rocks and
18 debris and localized grading of the approximately four-mile
19 long Emigrant Creek Road may marginally make access to
20 the area easier for hunters and may marginally increase
21 higher mortality. . . Furthermore, because of the increase in
22 human presence under the Proposed Action, the harassment
23 or poaching of wildlife may also increase.

24 Final EA p. 63.

25 In response to the FWP comment expressing concern over the impacts resulting
26 from the road improvements, DEQ revised its analysis as follows:

27 DEQ has re-evaluated the impact on wildlife resulting from
28 proposed road improvements and believes the draft EA
overstated the impacts. DEQ has revised Section 3.4.4
accordingly.

1 Vehicles would access the St. Julian Claim Block using the
2 existing roads between East River Road and the St. Julian
3 Mine Claim Block. The Proposed Action does not include
4 any new road construction. The approximate four-mile
5 length of Emigrant Creek Road from Old Chico to the St.
6 Julian Claim Block would be cleared of rock and debris
7 within its original configuration, some of which would
8 include hand picking. The road may be graded in localized
9 areas in order to keep it serviceable for the type of vehicles
10 that would be involved in the project. The clearing and
11 localized improvements to Emigrant Creek Road, however,
12 will not materially change its character of an unimproved
13 forest road. The clearing and localized grading should not
14 facilitate traffic on Emigrant Creek Road at appreciably
15 higher speeds than the current traffic. (Final EA, p. 188)

16 In responding to a comment submitted on behalf of Park County Environmental Council,
17 DEQ stated that the maintenance of the access roads would not continue after the two three-month
18 exploration seasons and that road conditions would naturally return to pre-project conditions. The
19 DEQ further opined that there would not be a genetic threat to wolverines as a result of the short-term
20 improved access included in the Proposed Action as the temporal duration is far too short. (Final EA
21 p. 308.)

22 The DEQ maintains that it did take a hard look at impacts to wolverines and grizzly bears.
23 DEQ acknowledges that the activity and noise associated with localized road improvements and
24 maintenance, drilling rigs and night lighting is likely to disturb any wolverines in the area and may
25 cause den abandonment. DEQ goes on to conclude, in the Final EA, that the activity associated with
26 the Proposed Action is limited spatially and temporally, allowing for avoidance of the area by
27 wolverines.
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1 The Final EA states that impacts of improved access to more remote areas may be detrimental
2 to regional populations, but DEQ maintains that this was inadvertently not edited out of the document
3 when DEQ changed its position from the Draft EA to the Final EA.

4
5 The DEQ maintains that it took a hard look at impacts to grizzly bears. It acknowledges that
6 the local abundance of grizzly bears is likely to be reduced for the duration of the exploration project
7 and that the use of lights during nighttime drilling may disrupt grizzly bear use of the area. The DEQ
8 determined that because the impacts are temporary, this should not result in the bears permanently
9 avoiding the area. The Final EA also acknowledges that the Proposed Action increases the potential
10 for human/bear conflicts leading to risk of harm or mortality of grizzly bears as well as risks to
11 human safety.
12

13 In the Final EA, DEQ again responded by stating that the bears would have a large amount of
14 undisturbed habitat because the Proposed Action is limited spatially and temporally. DEQ also points
15 to the stability of the grizzly bear population and the fact that the patented mining claims at issue here
16 do not lie within the Primary Conservation Area identified in the Grizzly Bear Conservation Strategy.
17

18 In its Reply Brief, the DEQ argues that the impact from Lucky's project are transitory because
19 the project is of a short duration. DEQ maintains that the Emigrant Gulch Road will return to its
20 present state by the forces of nature and gravity.
21

22 The Court concludes that DEQ failed to take a hard look at the harm to sensitive wildlife that
23 would follow from the improvements to the Emigrant Gulch Road. Though the Draft EA concluded
24 that the road improvements would increase wildlife mortality, DEQ downgraded this risk in the Final
25 EA, stating that, "the draft EA overstated the impacts." AR 197. This is so despite the comments of
26 FWP, raising significant concerns about the impacts to wildlife. DEQ's downgrading of the risk, in
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1 this manner, was not supported by the record. DEQ failed to “articulate . . . a rational connection
2 between the facts found and the choice made.” *Mont. Wildlife Fed’n v. Mont. Bd. Of Oil & Gas*
3 *Conservation*, 2012 MT 128, ¶43, 365 Mont. 232, 280 P.3d 877.

4
5 There is no basis for DEQ’s claim that Lucky’s plan to clear obstructions from the Emigrant
6 Road will not improve public access to the area. The Final EA appears to acknowledge this by
7 stating that the “[r]emoval of rocks and debris . . . may marginally make access to the area easier for
8 hunters and may marginally increase higher [wildlife] morality.” AR 72. DEQ offers no rational
9 basis for downgrading the risk to sensitive wildlife where FWP’s comments expressed concern that
10 such increased human presence would have “long-term implications for habitat suitability and
11 productivity of the area for wildlife” especially for “those species that are most sensitive to human
12 activity,” including wolverines and grizzly bears. AR 2983.

13
14 The DEQ violated MEPA in its treatment of this issue in the Final EA, by providing, “no
15 reasoned analysis whatsoever in support of its conclusion, which conclusion directly conflicts with
16 that of DEQ’s sister agency, FWP. *W. Watershed Project v. Kraayenbrink*, 632 F.3d 472 492-93 (9th
17 Cir. 2011). This is particularly so where wolverines are highly sensitive to human encroachment, and
18 have been a confirmed presence near the project area. AR 2575 AR 2352-2353.

19
20 The DEQ stated in the Final EA that “the impacts of improved access to more remote areas
21 may be detrimental to regional [wolverine] populations.” AR 75. The DEQ explains in its briefing
22 that this statement was an oversight that was meant to be edited out. That being the case, DEQ has
23 not explained any logical basis for the change of its position in the Final EA. The statements of
24 counsel interpreting what the DEQ may have meant must be disregarded by the Court. For example,
25 it its Brief, the DEQ attempts to dismiss the impact to wolverine den sites by asserting that Lucky’s
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1 drilling session does not overlap with the wolverine denning season. This is not a basis relied upon in
2 the EA. Moreover, the increased access to the upper reaches of the Emigrant Gulch Road, due to
3 road improvements, will remain after the drilling project is concluded.
4

5 In the Final EA, DEQ has failed to consider and take a "hard look" at wolverine and grizzly
6 bear impacts from increased human access to sensitive wildlife habitat that have the potential to
7 persist beyond the two-year period of Lucky's exploration. The road will remain improved, for
8 some unknown period of time, and the gradual lessening of accessibility of the road will be
9 interrupted.
10

11 The DEQ's analysis did not include a "hard look" at grizzly bear and wolverine impacts from
12 increased human access to sensitive wildlife habitat. *Ravalli Cty. Fish & Game Ass'n*, 273 Mont. at
13 381, 903 P.2d at 1369. Because the DEQ dismissed those impacts without examining the relevant
14 data and articulating a satisfactory explanation for its action, its decision violated MEPA. *Montana*
15 *Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation*, ¶ 43, quoting *Clark Fork Coal v. Mont.*
16 *Dep't of Envtl. Quality*, ¶ 47. In revising its conclusion concerning the impacts of improved access
17 to the Emigrant drainage, DEQ failed to examine the relevant data, including data submitted by
18 FWP, that contradicts the conclusion reached by DEQ. The DEQ did not articulate a satisfactory
19 explanation for its action that disregarded record evidence that road improvements would facilitate
20 greater motorized access, an increased human presence, and a detriment to wildlife.
21
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23 **Evaluation of Water Quality Impacts**

24 Plaintiffs maintain that DEQ failed to adequately consider water quality impacts due to
25 contaminated flow from the drill holes contemplated by the project. The DEQ acknowledged that
26 it is likely that Lucky would encounter artesian conditions during drilling. This means that
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1 groundwater may flow freely from the drill holes before the holes are plugged following
2 exploration. AR 127. Drilling fluid and groundwater that escape the drill pad under these
3 conditions and enter ground or surface waters, "could contain contamination that is independent of
4 the drill additives that are used," including dissolved metals and sulfuric acid which are extremely
5 toxic to fish and other aquatic life. AR 1866-1867.

7 Plaintiffs rely upon studies in the agency record documenting that mining project proposals
8 and analyses almost always predict that the potential for water contamination will be avoided or
9 mitigated, while post-mining water quality exceeds acceptable water quality standards. See AR
10 1874-1875.

12 Plaintiffs further point to the Final EA setting forth nothing more than a "plan to make a
13 plan" to address water contamination issues, as opposed to including concrete measures that could
14 be evaluated in the EA process. The Final EA states that Lucky "would develop a mitigation plan
15 to effectively contain flow from artesian boreholes during drilling... The procedures for artesian
16 flow containment would be developed prior to commencing drilling operations, and any necessary
17 equipment would be readily available onsite, if those conditions were encountered during drilling."
18 AR 128.

20 Plaintiffs maintain that the water quality information relied upon by DEQ in the Final EA to
21 dismiss potential impacts due to uncontrolled discharges from Lucky's artesian boreholes is
22 unrepresentative and incomplete. Plaintiffs maintain that DEQ cherry picked water quality data
23 from the Duval boreholes, which DEQ acknowledged "stand out" from data for other boreholes and
24 seeps in the vicinity of Lucky's planned drilling. AR 100; DEQ Br. P. 11, (asserting that the Duval
25 boreholes are "[t]he best predictor of artesian flow at the Lucky Project.") Plaintiffs maintain that
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1 in the Final EA, DEQ described, but then arbitrarily disregarded, other pertinent water-quality data,
2 including data gathered on the St. Julian Claim Block. These additional groundwater sources
3 exhibit higher acidity and concentrations of metals and other pollutants than the Duval boreholes.
4
5 AR 104, 110-111)

6 Though Lucky states in its Brief that “none of the existing artesian flows, seeps or springs,
7 exceed applicable water quality standards. (Lucky Brief. P. 9), three-cold-spring seeps immediately
8 adjacent to the Duval boreholes exhibit low to very low Ph and water quality exceedences for
9 several metals, including zinc, cadmium, copper, aluminum, lead, and significantly elevated
10 concentrations of sulfate,
11

12 Thus, Plaintiffs allege that DEQ selectively relied upon the Duval borehole data, while
13 ignoring other data that undermines its conclusions that artesian discharges will not have a
14 significant impact.
15

16 The Plaintiffs further allege that DEQ’s analysis was misleading because the record
17 demonstrates that the geology of the minerals Lucky proposes to probe is likely to produce harmful
18 acid rock drainage. They are sulfides which according to the LaFave report, primarily relied upon
19 by DEQ for its conclusions, produce acid rock drainage.
20

21 Lucky points out that it is required to ensure that any artesian flow from an exploration
22 borehole is terminated by plugging the hole. ARM 17.24.105(7). Further, DEQ requires a
23 containment plan be formulated and approved by DEQ prior to drilling. AR 31. Lucky maintains
24 that the artesian flow is not expected to be excessive, and that DEQ was unable to discern any
25 reason to require ground water from artesian flows be restrictively mitigated. AR 126.
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1 The DEQ dismisses Plaintiffs' claims stating that the presence of sulfide minerals in the
2 project area is "not supported by any analysis of available scientific information." DEQ Brief P. 10.
3 However, the Final EA and Lucky's technical report both acknowledge that the ore body Lucky
4 seeks to explore contains sulfide mineral deposits. AR 40.
5

6 DEQ suggests that the EPA report on acid mine drainage is an industry-wide report not
7 relevant to Lucky's specific project. However, LaFave 2016, on which DEQ extensively relied,
8 concluded that acid rock drainage near the project site occurs due to the presence of sulfide
9 minerals.
10

11 Finally, the Final EA states that the "water quality in the East fork [of Emigrant Creek]
12 degrades along the gulch, primarily due to inputs from ground water and surface discharge from
13 springs and seeps. AR 99. According to the Montana Bureau of Mines and Geology, "[t]he effects
14 [of the discharges] on ground water are unknown and may be of some concern. AR 8063.
15

16 In its Reply Brief, the DEQ points out that Plaintiffs do not take into consideration that
17 Lucky is required to plug its drill holes prior to removing the drill rigs. The DEQ takes issue with
18 Plaintiffs' concern about acid rock drainage. The DEQ maintains that the quality of the
19 groundwater on the slope north of the East Fork that has been impacted by locally intense pyrite
20 alteration is not representative of the quality of the groundwater to the south of the East Fork where
21 Lucky's mineral exploration activity has been approved. DEQ emphasizes that the Duvall
22 boreholes are in close proximity and elevation to the project area.
23

24 The Court concludes that the DEQ did not take the requisite "hard look" at the relevant data
25 regarding water quality issues for the following reasons:
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- 1 1. The Final EA provides only for a plan to make a plan to address water quality
2 issues, which is insufficient analysis for a Final EA.
- 3 2. The DEQ selectively relied upon the Duval bore hole data and ignored other
4 pertinent water quality data that undermines its conclusion that artesian
5 discharges will not have a significant environmental impact.
- 6 3. The record contradicts DEQ's prediction that Lucky's artesian discharges will not
7 harm surface or groundwater.
- 8 4. The DEQ ignored or dismissed the acid rock draining near the project site which
9 occurs due to the presence of sulfide minerals, where the minerals Lucky seeks to
10 explore for are sulfide minerals.

11 In doing so, DEQ failed to adequately consider pertinent data and failed to examine the relevant
12 data. *Mont. Wildlife Fed'n*, ¶ 43, *Clark Fork Coal*, ¶ 47, *National Audubon Soc'y v. Dept. of Navy*,
13 422 F. 3d 174, 194, (4th Cir. 2005). The DEQ's selective reliance on the Duval borehole data was
14 arbitrary and ignored other pertinent water-quality data to the detriment of the EA process. *Ravalli*
15 *Cty. Fish & Game Ass'n*, 273 Mont. At 381, 903 P.2d at 1369. The DEQ ignored the expert
16 analysis of acid rock drainage. The DEQ's analysis and conclusions regarding water quality issues
17 in the EA did not meet the requirements of MEPA.

18 **Consideration of Impacts from Mine Development on Federal Lands**

19 Plaintiffs maintain that DEQ's MEPA analysis is flawed because it failed to consider the
20 potential that Lucky's exploration project could facilitate full-scale mining, particularly if Lucky
21 were to use the exploration to obtain a vested right to develop minerals underlying adjacent
22 National Forest lands. Plaintiffs point to ARM 17.4.609(3)(d) which requires DEQ to evaluate a

1 project's direct and secondary environmental impacts, including "further impact to the human
2 environment that may be stimulated or induced by or otherwise result from a direct impact of the
3 action." *Id.*

4
5 Plaintiffs rely on *Bitterrooters for Planning, Inc. v. Mont. Dep't of Env'tl. Quality*, 2017 MT
6 222, ¶ 25, 388 Mont. 453, 401 P.3d 712 for the proposition that an agency's review must include all
7 impacts for which there is "'reasonably close causal relationship' between the subject government
8 action and the particular environmental effect." Plaintiffs argue that such a causal relationship
9 exists in this case because Lucky could attempt to use information it gains from its exploration
10 activities to establish a vested right to mine a much larger body of minerals underlying National
11 Forest lands.
12

13 Under the 1872 Mining Law, which governs mining on federal lands, an individual may
14 establish a 'valid existing right' to exploit federal minerals if he can demonstrate a reasonable
15 prospect of success in developing a valuable mine, given market conditions and relevant operating
16 costs. Mining companies have established such a right based upon "geologic inference" where
17 "[g]eologic information is used to determine the reasonable likelihood of the persistence of similar
18 mineralization beyond the areas actually sampled or exposed." *Wilderness Soc'y v. Dombeck*, 168
19 F.3d 367,375 (9TH Cir. 1999).
20
21

22 Plaintiffs maintain that Lucky's exploration raises the prospect that it may attempt to infer a
23 valid existing right to minerals not only on its own lands, by also on its unpatented mining claims
24 on federal lands, using information gained under this exploration permit. Plaintiffs believe Lucky
25 may seek to meet the "valid existing rights standard" by angle-drilling into such federal minerals
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1 from Lucky's patented mining claims on adjacent lands. The drill holes would be either vertical or
2 angled holes that could extend 1,000 to 2,000 feet from the ground surface. AR 44.

3 If such valid existing rights were established, the unpatented mining claim is a property
4 right in the full sense. *McKown v. United States*, 908 F. Supp. 2d 1122, 1124 (E.D. Cal. 2012).
5 Plaintiffs maintain that granting of an exploration license reflects the "go/nogo" point in the
6 development of federal minerals, or an "irretrievable commitment of resources" under MEPA.
7 Plaintiffs maintain that if Lucky were able to establish a valid existing right to federal minerals by
8 its exploration, DEQ would be unable to prevent the development of those minerals, but could only
9 place reasonable conditions on an operating permit to mitigate environmental impacts.
10

11 Thus, Plaintiffs argue, that contrary to MEPA, DEQ failed to provide "reasonable
12 assurance" that the severe environmental effects of mine development on National Forest lands will
13 not occur. ARM 17.4.608(1)(b). Because there are "substantial questions" about whether Lucky's
14 exploration project will cause such impacts, Plaintiffs argue, an EIS was required.
15

16 Lucky denies that the DEQ was obligated to evaluate the potential of mining taking place on
17 National Forest lands. Lucky maintains that Plaintiffs failed to raise this issue during scoping and
18 are precluded from arguing it now. Lucky emphasizes that it did not submit an application for a
19 mine operating permit, it simply requested an exploration permit for a very minor project. Lucky
20 maintains that DEQ was obligated to issue the license to Lucky upon payment of the statutory fees
21 and posting of the reclamation bond. §82-4-332, MCA. Lucky dismisses Plaintiffs' claims to the
22 contrary as speculative and contrary to legal precedent.
23

24 DEQ responds by maintaining that it properly confined its environmental review to the
25 proposed exploration program. DEQ also contends that Plaintiffs are raising this issue without
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1 having first raised the issue by way of comment from the Plaintiffs on the Draft EA. Though there
2 were a significant number of comments on the Draft EA that presumed the action under review was
3 the permitting of a mine, no comment was submitted regarding the issue of whether Lucky's
4 establishment of a vested right to mine under federal law would preclude DEQ's environmental
5 review of the mine. Thus, DEQ contends, this Court is precluded from considering the issue. under
6 § 75-1-201(6)(a)(ii), MCA.

8 DEQ denies that the environmental impacts from potential mining are secondary impacts to
9 Lucky's mineral exploration activity. DEQ argues that Plaintiffs inconsistently state that Lucky's
10 ability to develop a full-scale mine based upon its exploration license is uncertain, and, at the same
11 time, argue there is a causal link between the exploration program and the environmental impacts
12 that may result from mining under adjacent Forest Service land. DEQ emphasizes that any
13 potential future mining would be the subject of another environmental review under MEPA.

15 DEQ asserts that there is no causal relationship between the information Lucky would gain
16 from exploration and a vested right to mine under adjacent Forest Service Land. DEQ disagrees
17 with Plaintiffs' reliance on *Bitterrooters for Planning and White Tanks Concerned Citizens, Inc. v.*
18 *Stock*, to support its position that environmental impacts resulting from any future mining must be
19 evaluated in this review regarding Lucky's exploration project. In those cases, the issue was
20 whether an agency's action should be considered a cause of an environmental effect even when the
21 agency has no authority to prevent the effect. DEQ maintains those cases are not analogous to the
22 instant case because DEQ has regulatory authority over any future mining that may be conducted by
23 Lucky.

1 DEQ argues that the instant case is analogous to *North Fork Preservation Ass'n v. Dept. of*
2 *State Lands*, 238 Mont. 451, 778 P.2d 862(1989). In that case, State Lands issued an approval
3 allowing Cenex to drill one exploratory well under an oil and gas lease, and determined that an EIS
4 was not required. The district court determined that full-field development required preparation of
5 an EIS. The Supreme Court disagreed and determined the district court was incorrect in concluding
6 that full development of oil and gas "was a matter of successive steps set into irreversible motion by
7 the issuance of the lease". The Court was not to assume that State Lands would not comply with
8 its MEPA obligations at a later stage of development and full-field development was not the
9 proposed action before the Department of State Lands. *Id.* 463-64.
10

11 DEQ maintains that Plaintiffs' reliance on *Cal. Coastal Com. v. Granite Rock Co.*, 480 U.S.
12 572 (1987) is misplaced. In that case, DEQ emphasizes, the Supreme Court held that Forest
13 Service regulations were devoid of an expression of intent to pre-empt state laws regulating
14 unpatented mining claims in national forests, but rather appear to assume that those submitting
15 plans of operation will comply with state laws. The Court found that the state's laws were not pre-
16 empted.
17

18 In their Reply, Plaintiffs initially maintain that they adequately alerted the DEQ to this issue.
19 Numerous commenters requested that DEQ evaluate the impacts of full scale mining that might
20 occur as a result of the exploration. Plaintiffs' comments gave notice that Lucky's plan for angle
21 drilling "raises the question of the Proposed Action intersecting minerals that lie underneath public
22 lands that are subject to the segregative effects of a withdrawal notice, "and that drilling of federal
23 minerals requires a determination of "valid existing rights" to such minerals, "including those that
24 may be accessed via angled drilling from private land." AR 3023; See also AR 3022.
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1 Plaintiffs go on to reiterate that DEQ was required to evaluate the impacts of mining
2 underneath National Forest lands because if Lucky demonstrates valid existing rights to such
3 minerals based on its exploration project, DEQ would be unable to prohibit their development.
4 DEQ contests this position and argues that DEQ has all of its regulatory authority over future
5 mining, notwithstanding any demonstration of valid existing rights. However, Lucky disagrees
6 with DEQ's position and states that "DEQ does not possess the authority to prevent mining."
7 Lucky's Brief, p. 12.
8

9 The crux of the issue in this case is that Lucky may establish valid existing rights with
10 respect to minerals on adjacent federal lands by conducting its exploration under the exploration
11 license at issue here. If Lucky were able to establish such valid existing rights, they would amount
12 to a possessory interest, under federal mining law, that would entitle them to extract all minerals
13 from the claim. *McMaster v. United States*, 731 F.3d 881, 885 (9th Cir. 2013). Though DEQ could
14 regulate such mining, it could not prohibit it altogether without violating the claimant's rights under
15 federal law. The holding in *Cal Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 586-589
16 (1987) is in accord by finding that state regulation of mining was not preempted, "where it does not
17 seek to prohibit mining of the unpatented claim on national forest land."
18
19

20 The application of federal law to DEQ's right to regulate a valid existing right as to
21 minerals underlying federal lands, takes the inquiry out of the realm of *North Fork Preservation*
22 *Association, supra*. This is so because DEQ would lack the ability to deny the mining of minerals
23 underlying federal lands and would be relegated to regulating, rather than being able to preclude the
24 mining operation. In *North Fork Preservation Association*, the Court affirmed that the key question
25 in determining whether further resource development must be anticipated and evaluated in the
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1 initial stage of agency approvals is whether the agency's actions entail an 'irretrievable commitment
2 of resources.' *N. Fork Pres. Ass'n v. Dept of State Lands*, 238 Mont. 451, 461-462, 778 P.2d 862,
3 868-869 (1989).

4
5 The Court in *North Fork Preservation Association* relied upon *Connor v. Burford*, 848 F.2d
6 1441, 1449 (9th Cir. 1988) for the proposition that "an irretrievable commitment of resources is
7 reached when the agency no longer has "the absolute right to prevent all surface-disturbing activity."
8 The *Conner* Court explained that, "[t]he 'heart' of the EIS—the consideration of reasonable
9 alternatives to the proposed action—requires federal agencies to consider seriously the "no action"
10 alternative before approving a project with significant environmental effects." *Id.* at 1451. "The
11 government's right to regulate, rather than preclude, surface disturbing activities" is an insufficient
12 basis for the agency to avoid examining such activities in an EIS before the initial authorization. *Id.*
13 at 1449. The Court in *Conner* explained,

14
15
16 . . . an EIS must be prepared as long as "substantial
17 questions" remain as to whether the measures will
18 completely preclude significant environmental effects.
19 *Friends of the Earth v. Hintz*, 800 F.2d 822, 836 (9th Cir.
20 1986); *Foundation for North Am. Wild Sheep v. United*
21 *States*, 681 F.2d 1172, 1180-81 (9th Cir. 1982). Thus, even
22 if there is a chance that regulation of surface-disturbing
23 activities will render insignificant the impacts of those
24 activities, that possibility does not dispel substantial
25 questions regarding the government's ability to adequately
26 regulate activities which it cannot absolutely preclude. In
27 sum, we agree with the district court that the government
28 violated NEPA by selling non-NSO leases without
preparing an EIS.

...

Appellants' suggestion that we approve now and ask
questions later is precisely the type of environmentally
blind decision-making NEPA was designed to avoid.

1 *Conner v. Burford*, 848 F.2d 1441, 1450-1451, 1988 U.S. App. LEXIS 296, *27-30,

2 Lucky maintains that there are not currently “vested” rights to mine that are available to
3 Lucky under the mining laws of the United States. Lucky has not, however, disavowed an intention
4 to angle drill under the National Forest during its exploration activities nor then using information
5 gained thereby to establish such a “vested” right.
6

7 The Court concludes first that DEQ was adequately put on notice of the issue of Lucky
8 drilling into segregated, federal minerals. DEQ failed to evaluate the impacts of mining underneath
9 National Forest lands, since if Lucky demonstrates valid existing rights to such minerals in
10 conducting its exploration activities, DEQ would be unable to prohibit their development.
11

12 This is, “a secondary impact to the human environment that may be stimulated or induced
13 by or otherwise result from a direct impact of the action”, which the DEQ was required to evaluate
14 under ARM 17.4.603(18). Further, in determining the impacts on the quality of the human
15 environment, the DEQ was required to consider “any precedent that would be set as a result of an
16 impact of the proposed action that would commit the Department to future actions with significant
17 impacts or a decision in principle about such further actions” ARM 17.4.608(1)(f). The granting of
18 the exploration license does set a precedent that would commit the department to the future action
19 of allowing mining and development of any valid existing rights to minerals underlying National
20 Forest Lands that may be established by information gained in the exploration activities.
21

22 This significant potential impact alone mandated the preparation of an EIS.
23

24 **Evaluation of Feasible Project Alternatives**

25 The DEQ is required to consider alternatives to the proposed project in preparing an EA.
26 Pursuant to ARM 17.4.607(2)(b), one of the purposes of an EA, is to “assist in the evaluation of
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1 reasonable alternatives and the development of conditions, stipulations or modifications to be made
2 part of a proposed action. Pursuant to § 75-1-201(1)(b)(v), MCA, agencies must “study, develop,
3 and describe appropriate alternatives to recommended courses of action in any proposal that
4 involves unresolved conflicts concerning alternative uses of available resources.”

5
6 Plaintiffs maintain that DEQ adopted Lucky’s stated objective, without discussion or visible
7 consideration of at least two feasible project alternatives. DEQ first dismissed an alternative that
8 would have limited Lucky’s exploration license to one field season and the use of four drilling rigs
9 rather than two. Second, DEQ dismissed an alternative to eliminate night drilling. Though
10 eliminating night drilling would have eliminated some wildlife impacts, DEQ dismissed this
11 alternative because it would extend the exploration.
12

13 Plaintiffs take issue with the fact that DEQ did not evaluate an alternative that would reduce
14 the number of holes it would drill and that DEQ asserted it had no basis to second-guess Lucky’s
15 need to drill at all of the proposed locations. Plaintiffs cite to *Nat’l Parks Conservation Ass’n v.*
16 *Bureau of Land Mgmt.*, 606 F. 3d 1058, 1072, (9th Cir. 2010) which held that an agency may not
17 “adopt private interests to draft a narrow purpose and need statement that excludes alternatives that
18 fail to meet specific private objectives.” The DEQ is obligated to consult with Lucky regarding
19 proposed alternatives and “give due weight and consideration to its comments”, § 75-1-
20 201(b)(iv)(C)(II), MCA. This does not, however, negate the DEQ’s obligation to consider project
21 alternatives that are economically feasible. Further, the EA must include “a description and
22 analysis of reasonable alternatives to a proposed action whenever alternatives are reasonable
23 available and prudent to consider.” § 75-1-201(1)(b)(iv)(C)(I); ARM 17.4.609(3)(f).
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1 The DEQ responds by pointing out that in the Final EA, DEQ evaluated a Proposed Action
2 Alternative, a No Action Alternative and an Agency-Modified Alternative. DEQ evaluated an
3 alternative requiring Lucky to complete its 46 drill hole exploration program in one season. This
4 alternative was rejected because the impacts would have been substantially similar. It also
5 evaluated an alternative that would have eliminated night drilling. This alternative was rejected
6 because the impacts would have extended over three to four field seasons.
7

8 The DEQ asserts that applicable case law prevents the agency from determining for the
9 applicant what the goals of an applicant's proposal should be. DEQ maintains that the purpose-and-
10 need statement in the Lucky Final EA comports with applicable case law. DEQ maintains that it
11 has no basis to second-guess Lucky's need to drill up to 46 bore holes at 23 drill sites. Final EA, p.
12 300.
13

14 In its Reply Brief, the DEQ emphasizes that the case law requires DEQ to take into account
15 the needs and goals of the parties involved in the application. In *Citizens Against Burlington, Inc.*
16 *v. Busey*, 938 F.2d 190. (DC Cir. 1991), the Court concluded that the FAA had evaluated the only
17 alternative that might reasonably accomplish the Airport's goal of expanding the Toledo Express
18 Airport. Other authority cited by the DEQ stands for the proposition that the reviewing agency does
19 not have to consider the alternative of a scaled back project, in lieu of the proposal submitted.
20

21 Lucky concurs in the DEQ's appropriate consideration of alternatives, particularly given
22 what Lucky characterizes as the minor nature of its exploration program. Lucky also points to § 75-
23 1-220(1), MCA which mandates evaluation of "different parameters, mitigation measures or control
24 measures that would accomplish the same objectives as those included in the proposed action by
25 the applicant."
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1 Plaintiffs respond by noting that nothing in the cases relied upon by DEQ relieves an agency
2 of its obligation to evaluate alternate ways of achieving the project's goals. Plaintiffs acknowledge
3 that DEQ, in proposing and adopting an agency-modified alternative, complied with MEPA's
4 requirement that the agency give due weight and consideration to the project sponsor's comments
5 by seeking and responding to Lucky's input on the changes. AR 30-34; AR 656-663. However, by
6 contrast, Plaintiffs maintain that DEQ dismissed the no night drilling and one season alternatives,
7 without ever inquiring whether Lucky could meet its project goals under either of the alternatives.
8

9 The fundamental difference in the parties' positions on the issue of consideration of
10 alternatives is DEQ's refusal to consider an alternative that would alter the basic parameters of the
11 applicant's project and Plaintiff's insistence that MEPA requires the DEQ to evaluate different
12 parameters that would accomplish the project's objectives while lessening its impacts. § 75-1-
13 220(1), MCA.
14

15 The Court concludes that DEQ in this instance, gave unwarranted deference to Lucky's
16 proposal, without conducting an independent analysis of alternatives, particularly the "no night
17 drilling" and "one season" alternatives in order to determine whether the environmental impacts
18 could be reduced, while still meeting the basic goals of the project.
19

20 CONCLUSION

21 MEPA was designed "to promote efforts that will prevent, mitigate, or eliminate damage to
22 the environment and biosphere and stimulate the health and welfare of humans. § 75-1-102(2),
23 MCA. To meet these purposes, MEPA requires the DEQ to "take a 'hard look' at the
24 environmental impacts of a given project or proposal." *Mont. Wildlife Fed'n v. Mont. Bd. Of Oil &*
25 *Gas Conservation*, 2012 MT 128, ¶ 43, 365 Mont. 232, 280 P.3d 877. "The Court looks closely at
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1 whether the agency has taken a hard look at the question presented. The Court does not take a hard
2 look itself, but requires that the agency does so.” *Clark Fork Coalition v. MT. DEQ*, 2008 MT 407,
3 ¶ 47, 347 Mont. 197, 197 P.3d 482. For an EA to suffice, the agency must determine that all of the
4 impacts of the proposed action have been accurately identified, that they will be mitigated below
5 the level of significance, and that no significant impact is likely to occur. ARM 17.4.607(4). In
6 identifying and evaluating these matters, the DEQ “must examine the relevant data and articulate a
7 satisfactory explanation for its action, including a rational connection between the facts found and
8 the choice made. *Mont. Wildlife Fed’n*, ¶ 43.
9

10
11 The Court concludes that the DEQ’s analysis regarding the issues found herein was
12 arbitrary, capricious and not supported by substantial evidence.

13 The DEQ’s analysis did not include a “hard look” at grizzly bear and wolverine impacts
14 from increased human access to sensitive wildlife habitat. *Ravalli Cty. Fish & Game Ass’n*, 273
15 Mont. at 381, 903 P.2d at 1369. Because the DEQ dismissed those impacts without examining the
16 relevant data and articulating a satisfactory explanation for its action, its decision violated MEPA.
17 *Montana Wildlife Fed’n v. Mont. Bd. of Oil & Gas Conservation*, ¶ 43, quoting *Clark Fork Coal v.*
18 *Mont. Dep’t of Envtl. Quality*, ¶ 47.
19

20 The Court concludes that the DEQ did not take the requisite “hard look” at the relevant data
21 regarding water quality issues. The Final EA provides only for a plan to make a plan to address
22 water quality; the DEQ selectively relied upon the Duval bore hole data and ignored other pertinent
23 water quality data; the record contradicts DEQ’s prediction that artesian discharges will not have a
24 significant environmental impact not cause harm to surface or ground water; and the DEQ did not
25 adequately address or explain its dismissal of the acid rock drainage issue.
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1 In doing so, DEQ failed to adequately consider pertinent data and failed to examine the
2 relevant data. *Mont. Wildlife Fed'n*, ¶ 43, *Clark Fork Coal*, ¶ 47, *National Audubon Soc'y v. Dept.*
3 *of Navy*, 422 F. 3d 174, 194, (4th Cir. 2005). The DEQ's selective reliance on the Duval borehole
4 data was arbitrary and ignored other pertinent water-quality data to the detriment of the EA process.
5 *Ravalli Cty. Fish & Game Ass'n*, 273 Mont. At 381, 903 P.2d at 1369. The DEQ ignored the expert
6 analysis of acid rock drainage. The DEQ's analysis and conclusions regarding water quality issues
7 in the EA did not meet the requirements of MEPA.
8

9 DEQ was adequately put on notice of the issue of Lucky drilling into segregated, federal
10 minerals. DEQ failed to evaluate the impacts of mining underneath National Forest lands, since if
11 Lucky demonstrates valid existing rights to such minerals in conducting its exploration activities,
12 DEQ would be unable to prohibit their development.
13

14 This is, "a secondary impact to the human environment that may be stimulated or induced
15 by or otherwise result from a direct impact of the action", which the DEQ was required to evaluate
16 under ARM 17.4.603(18). Further, in determining the impacts on the quality of the human
17 environment, the DEQ was required to consider "any precedent that would be set as a result of an
18 impact of the proposed action that would commit the Department to future actions with significant
19 impacts or a decision in principle about such further actions" ARM 17.4.608(1)(f) The granting of
20 the exploration license does set a precedent that would commit the department to the future action
21 of allowing mining and development of any valid existing rights to minerals underlying National
22 Forest lands that may be established by information gained in the exploration activities. DEQ's EA
23 is not in keeping with the mandates of MEPA with regard to this issue.
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1 Finally, the Court concludes that the DEQ, in this instance, gave unwarranted deference to
2 Lucky's proposal, without conducting an independent analysis of alternatives, particularly the "no
3 night drilling" and "one season" alternatives in order to determine whether the environmental
4 impacts could be reduced, while still meeting the basic goals of the project. The EA fails to
5 comport with MEPA in this regard.
6


7 Based upon the foregoing decision, good cause exists for entry of the following order:

8 **ORDER**

9 **I.**

10 Plaintiffs' counsel shall prepare an Order that is consistent with the Court's Decision, as set
11 forth above.
12

13 SO ORDERED this 23rd day of May, 2018.

14
15 
16 BRENDA R. GILBERT, District Court Judge

17
18 CC: Jenny K. Harbine / Joshua R. Purtle
19 C. Edward Hayes / John F. North
20 KD Feedback
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> mid 5/23/18 p.p.

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MONTANA SIXTH JUDICIAL DISTRICT COURT
PARK COUNTY

PARK COUNTY ENVIRONMENTAL
COUNCIL and GREATER YELLOWSTONE
COALITION,

Plaintiffs,

v.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Defendant.

Case No. DV-17-126

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

INTRODUCTION

1. This case challenges state approval for a plan by Canadian-based Lucky Minerals ("Lucky") to explore for gold and other minerals in Emigrant Gulch above Montana's iconic Paradise Valley, approximately 30 miles north of Yellowstone National Park. Lucky's project aims to pave the way for a large-scale gold mine in this sensitive and scenic area. More than 300 Park County, Montana businesses and thousands of individuals have objected to the project on grounds that it would industrialize a remote area that is home to grizzly bears, wolverines, and other wildlife, and would threaten to dismantle Park County's tourism economy that depends on clean water and pristine views. However, on July 26, 2017, the Montana Department of Environmental Quality ("DEQ") determined that the exploratory drilling—which would occur 24 hours each day between July 15 and October 15 for two consecutive years—would not cause any significant environmental impacts and approved the project.

2. DEQ's determination violated the Montana Environmental Policy Act ("MEPA"), which was enacted "to prevent or eliminate environmental damage" by fostering more informed decision-making by state agencies. Pompeys Pillar Historical Ass'n v. Mont. Dep't of Envtl. Quality, 2002 MT 352, ¶ 17, 313 Mont. 401, 61 P.3d 148; see also Mont. Code Ann. § 75-1-102(3) (MEPA's purpose is "to inform the public and public officials of potential impacts resulting from decisions made by state agencies"). Although DEQ acknowledged in its Final Environmental Assessment ("Final EA") that the drilling project could harm sensitive wildlife and risk pollution of water resources, among other things, DEQ arbitrarily deemed these impacts insignificant without disclosing any legitimate rationale for its determination based on the evidence before the agency. And DEQ failed altogether to evaluate and disclose the potentially severe impacts of full-scale mining in Emigrant Gulch that could result from the exploration

project. Absent a rational finding that exploration in Emigrant Gulch will not cause significant environmental impacts, DEQ was required under MEPA to prepare an environmental impact statement ("EIS") thoroughly vetting the project's impacts.

3. In addition to its failure to rationally assess the project's environmental impacts, DEQ dismissed feasible project alternatives that could reduce the project's acknowledged impacts, improperly deferring to Lucky's proposed project scope without an independent assessment of the need for such a large exploration project, as MEPA requires.

4. In sum, DEQ failed to take a hard look at the environmental impacts of mineral exploration in Emigrant Gulch, dismissed evidence of significant impacts requiring preparation of an EIS, and failed to consider potentially reasonable alternatives to the project Lucky has proposed. DEQ's decision to issue an exploration permit based on this incomplete environmental analysis was therefore arbitrary, capricious, and contrary to MEPA.

JURISDICTION AND VENUE

5. Plaintiffs bring this action pursuant to the Uniform Declaratory Judgments Act, Mont. Code Ann. §§ 27-8-201, 202; and the Montana Environmental Policy Act, Mont. Code Ann. § 75-1-201.

6. Venue is proper in this district because plaintiff Park County Environmental Council is headquartered in this district, Mont. Code Ann. § 25-2-126(1), and the exploration project plaintiffs challenge will occur in Park County, Mont. Code Ann. § 75-1-108.

PARTIES

7. Plaintiff Park County Environmental Council ("PCEC") is a not-for-profit community organization based in Livingston, Montana, that aims to protect and enhance the quality of life in Park County by working with community members to preserve and restore our

rivers, wildlife, and landscapes. PCEC's vision is to create resilient ecosystems, communities, and economies in Park County by advocating for open lands and clean air and water.

8. Plaintiff Greater Yellowstone Coalition ("GYC") is a regional conservation organization based in Bozeman, Montana, with offices in Idaho and Wyoming and more than 90,000 members and supporters from across the country and within the Northern Rockies. GYC's mission is to protect the lands, waters, and wildlife of the Greater Yellowstone Ecosystem now and for future generations.

9. Plaintiffs' members include residents living in communities throughout Paradise Valley, including Old Chico and Emigrant Gulch, and visitors enjoying the Greater Yellowstone Ecosystem, the Custer Gallatin National Forest, the Yellowstone River, Old Chico and Chico Hot Springs. Plaintiffs' members live, work, and recreate in and around the area that will be affected by the proposed exploration project. Plaintiffs' members seek opportunities to view grizzly bears, wolverines, and other wildlife in Emigrant Gulch and nearby drainages in the Absaroka Mountains. Plaintiffs' members also fish in the Yellowstone River, and rely on the high quality of water in the Yellowstone and its tributaries to support a healthy fish population. Many of plaintiffs' members rely for their livelihoods on the tourism and recreation industries in Paradise Valley and Yellowstone National Park, which depend on the persistence of the unique environmental values the region has enjoyed for thousands of years.

10. Plaintiffs and their members are among the thousands of people who submitted comments to DEQ to urge the agency to thoroughly evaluate the many significant impacts of Lucky's exploration project in Emigrant Gulch through preparation of an EIS. Plaintiffs and their members' aesthetic, conservation, recreational, scientific, educational, economic, and wildlife preservation interests have been, are being, and will continue to be adversely affected by

DEQ's failure to adequately evaluate and disclose all the impacts of the proposed exploration project, and by the proposed exploration project itself.

11. Defendant Montana Department of Environmental Quality ("DEQ") is the agency charged with issuing permits for mineral exploration under the Metal Mine Reclamation Act, Mont. Code Ann. § 82-4-332, and evaluating the environmental impacts of proposed exploration under MEPA, Mont. Code Ann. § 75-1-201. DEQ prepared and issued the Final EA approving the proposed exploration project in Emigrant Gulch.

12. Defendant Lucky Minerals, Inc. is a Canadian-based corporation that holds the mineral exploration license that is challenged in this proceeding, and is therefore a proper party to this action under Mont. Code Ann. § 27-8-301. According to its website, "Lucky Minerals is a venture stage exploration company that is targeting a large-scale porphyry copper-gold-molybdenum system in southern Montana that could potentially host a multi-million ounce gold deposit." See Lucky Minerals, Inc., www.luckyminerals.com (last visited Sept. 21, 2017).

BACKGROUND

I. THE PROPOSED EXPLORATION IN PARADISE VALLEY

13. Lucky Minerals proposes to explore for gold in one of the most spectacular areas of the Custer Gallatin National Forest, just 30 miles north of Yellowstone National Park. Emigrant Peak, near the site of the proposed exploration, is within the Absaroka Mountains and lies just outside the rugged and remote Absaroka-Beartooth Wilderness. The nearly 11,000-foot high peak is one of the most prominent mountain tops visible from the aptly named Paradise Valley, to the west. Emigrant Peak is flanked by Emigrant Creek (the waterbody in Emigrant Gulch) on the north and Sixmile Creek on the south, both of which are tributaries of the Yellowstone River. The Absaroka Mountains, including Emigrant Peak and its adjacent valleys,

are home to bighorn sheep, elk, deer, moose, marmots, coyotes, black bears, grizzly bears, and wolves. The Absarokas also provide important, occupied habitat for state-listed species of concern, including wolverines and grizzly bears, as well as Canada Lynx, which is a threatened species under the federal Endangered Species Act. Further, as part of the Greater Yellowstone Ecosystem, these public lands constitute part of the largest intact natural areas in the lower-48 United States.

14. For these reasons, Emigrant Peak and its surrounding drainages are important places for people throughout the country. But they are also local treasures. Emigrant Peak is one of the most popular year-round recreation destinations in Montana, including for hiking in the summer and backcountry skiing in the winter. Since 1900, area residents and visitors have soaked in the natural mineral pools of Chico Hot Springs, which sits at the mouth of Emigrant Gulch. These features and the pristine beauty of the area are also important to the local economy; supporting tourism that directly and indirectly employs large numbers of Park County residents.

15. The proposed mineral exploration project would introduce industrial activity into the Emigrant Peak area, which has not seen significant mining or exploration activity for more than 20 years. Lucky proposes to drill 46 boreholes at 23 locations in the so-called St. Julian Claim Block in Emigrant Gulch, just up the road from Chico Hot Springs. Final EA at 19. Each hole would be drilled to depths between 1,000 and 2,000 feet. Id. at 20. To access this area, Lucky proposes to improve the Emigrant Creek Road and certain Forest Service roads, which are currently in poor condition and inaccessible to most vehicles. Road improvements will include "grading in localized areas, as necessary, in order to keep them serviceable for the type of vehicles that would be involved with the Proposed Action;" clearing of rock and other debris

from the road surface; and “slop[ing] to enhance draining and prevent channeling.” Id. at 17. DEQ acknowledges that “[i]mprovements to the existing roads would facilitate an increase in motorized access and hunter access into higher, more remote areas in the drainage,” impacting sensitive species such as wolverines. Id. at 66. Indeed, “[g]iven the low reproductive potential of wolverines, the impacts of improved access to more remote areas may be detrimental to regional populations.” Id. at 66 (citation omitted).

16. Exploration will continue for nearly 24 hours a day over two three-month field seasons. Id. at 16, 20. Lights similar to those used by highway construction crews would light the operation every night, disturbing nearby wolverines, bats, and other wildlife. Id. at 20, 63–66. The project would require use of a D-7 bulldozer, a G-12-14 grader, a JD-50 excavator or backhoe, two LF-70 drilling machines, three diesel- or gas-powered water pumps, two service trucks, one four-by-four pickup truck, and two ATVs. Id. at 17. Ten workers would be present in the project area at all times. Id. at 20.

17. Although significant in its own right, the proposed project is only the first phase of “an aggressive exploration program,” that Lucky proposes to conduct in Emigrant Gulch in the coming years. Lucky Minerals, Technical Report, The Emigrant Mining District Project, at 7 (Mar. 2015). In later phases, Lucky intends to construct new roads and drill at additional locations, on both private property and public land. Id. at 8, 73. Lucky’s “[o]verall target” is a mine capable of producing millions of ounces of gold, copper, and silver. Id. at 73.

18. The affected community in Park County, Montana—including more than 300 businesses—and Montana’s entire congressional delegation have opposed Lucky’s plan for gold mining in Emigrant Gulch. Park County’s newspaper, The Livingston Enterprise, editorialized that, “[a]s we have learned from a long, sordid history of mining in Montana, we must be

selective and critical in determining where companies are given the green light for resource extraction. ... Emigrant Peak is the ideal location for many activities, but a mine exploration project isn't one of them." Justin Post, There's a place for mines, and it's not on Emigrant Peak, Livingston Enterprise (July 10, 2015). Community meetings in Park County have drawn in hundreds of local residents, revealing substantial opposition to any proposal for exploration drilling in Emigrant Gulch. The vast majority of the more than 3,000 comments DEQ received on its draft environmental assessment for Lucky's proposal highlighted the harm Park County's environment, economy, residents, and businesses will suffer if the exploration project goes forward.

19. Reflecting this opposition to gold exploration in Emigrant Gulch, on November 21, 2016, the U.S. Forest Service and Department of Interior announced a proposal to withdraw 30,000 acres of land in Paradise Valley—including National Forest System lands adjacent to Lucky's proposed project—from mineral exploration and development. See Notice of Application for Withdrawal and Notification of Public Meeting, 81 Fed. Reg. 83,867, 83,867 (Nov. 22, 2016). The proposal had the immediate effect of preventing mining activity, subject to valid existing rights, for two years. Id. If finalized, the withdrawal will prevent mining activity on these lands for as many as 20 years. Id. U.S. Secretary of Interior Ryan Zinke recently announced that the Department of Interior will finalize the withdrawal "as quickly as possible" because "[s]ome places are too precious to mine." Matthew Brown, Assoc. Press, Zinke urges mining ban near Yellowstone, Billings Gazette (Aug. 28, 2017), http://billingsgazette.com/news/government-and-politics/zinke-urges-mining-ban-near-yellowstone/article_4327a00a-99f1-5b15-a481-523627192298.html. The withdrawal is intended "to protect and preserve the scenic integrity, important wildlife corridors, and high quality recreation values of the Emigrant Crevice

area located in the Custer Gallatin National Forest, Park County, Montana.” 81 Fed. Reg. at 83,867.

20. Those same values the federal withdrawal seeks to preserve are threatened by the exploration project Lucky intends to conduct on its private claims, which is not precluded by the public lands withdrawal. Given the intensity of the proposed industrial activity within sensitive and remote lands in Emigrant Gulch and the likely significant local and regional impacts, it was critical that DEQ fully and rationally evaluate the project’s environmental impacts as required by MEPA. In addition, there is significant uncertainty about Lucky’s ability to use exploratory drilling on private lands to establish rights to develop a full-scale mine on adjacent National Forest system lands, notwithstanding the withdrawal. DEQ’s MEPA analysis failed to adequately evaluate and disclose all of these direct and indirect impacts, and its decision to issue an exploration license on the basis of such deficient environmental analysis was arbitrary, capricious, and contrary to law.

II. MEPA

21. MEPA was designed “to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans.” Mont. Code Ann. § 75-1-102(2). To meet this purpose, MEPA requires DEQ to “take a ‘hard look’ at the environmental impacts of a given project or proposal.” Mont. Wildlife Fed’n v. Mont. Bd. of Oil & Gas Conservation, 2012 MT 128, ¶ 43, 365 Mont. 232, 280 P.3d 877; see also Mont. Code Ann. § 75-1-201(1)(b)(iv); Admin. R. Mont. 17.4.609(3)(d). The agency must consider, among other things, reasonable alternatives to the proposed action, Mont. Code Ann. §§ 75-1-201(1)(b)(iv)(C), 75-1-201(1)(b)(v); the direct, indirect, and cumulative environmental impacts of the action, id. § 75-1-201(1)(b)(iv); Admin. R. Mont. 17.4.609(3)(d) (requiring an

evaluation of "impacts, including cumulative and secondary impacts, on the physical environment"); and "the economic advantages and disadvantages of the proposal," Mont. Code Ann. § 75-1-201(1)(b)(iv)(H); see also Admin. R. Mont. 17.4.609(3)(e). In evaluating environmental impacts pursuant to MEPA requirements, "[t]he agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." Mont. Wildlife Fed'n, ¶ 43 (quoting Clark Fork Coal. v. Mont. Dep't of Env. Quality, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482).

22. DEQ must prepare an environmental impact statement ("EIS") before granting an exploration license if the proposed project will "significantly affect[] the quality of the human environment." Admin. R. Mont. 17.4.607(1). DEQ may issue an exploration license without preparing an EIS only if it rationally determines through preparation of an environmental assessment ("EA") that the project's impacts will not be significant, see id. 17.4.607(1)(b), or that otherwise significant impacts can be mitigated below the level of significance, id. 17.4.607(4) ("For an EA to suffice in this instance, the agency must determine that all of the impacts of the proposed action have been accurately identified, that they will be mitigated below the level of significance, and that no significant impact is likely to occur."). (An EA or EIS is not required for certain limited categories of actions, none of which is relevant here. See Admin R. Mont. 17.4.607(5).)

23. In determining whether the impacts of a proposed action will be significant, the Department must consider:

- (a) the severity, duration, geographic extent, and frequency of occurrence of the impact;

- (b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;
- (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;
- (d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;
- (e) the importance to the state and to society of each environmental resource or value that would be affected;
- (f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and
- (g) potential conflict with local, state, or federal laws, requirements, or formal plans.

Admin. R. Mont. 17.4.608(1).

24. In addition, “[a]gencies must prepare environmental impact statements whenever a federal action is ‘controversial,’ that is, when ‘substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor.’” Nat’l Parks Conservation Ass’n v. Babbitt, 241 F.3d 736 (9th Cir. 2001) (quoting Nw. Env’tl. Def. Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1536 (9th Cir. 1997)), abrogated in other part by Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 157 (2010); accord Protecting Paradise v. Mont. Dep’t of Env’tl. Quality, No. DV-12-123, slip. op. at 10–11 (Mont. 6th Jud. Dist. July 16, 2013) (applying “substantial questions” standard in MEPA case). Where an uncertain impact of an agency action is potentially severe, DEQ may not deem it insignificant without “reasonable assurance ... that the impact will not occur.” Admin. R. Mont. 17.4.608(1)(b).

25. As set forth below, DEQ did not meet these legal standards before granting Lucky’s exploration license.

III. DEQ'S FLAWED MEPA ANALYSIS

26. DEQ began its environmental review after Lucky filed its first exploration license application in April 2015. Final EA at 9. The original application included proposed drilling on both private patented mining claims (the “St. Julian Claim Block”) and adjacent National Forest land. Id. at 9. DEQ and the Custer Gallatin National Forest informed the public of this proposal on June 2, 2015, and requested comments concerning the scope of their environmental review by July 15, 2015. Id. at 10. The agencies later extended the scoping comment period to August 20, 2015. Id. DEQ received roughly 6,250 public comments during the scoping period. Id.

27. On November 30, 2015, Lucky withdrew its initial application and submitted a new proposal to drill on private land only. Final EA at 10. DEQ released a Draft Environmental Assessment (“Draft EA”) for the proposal on October 13, 2016, and accepted public comments on the draft until December 12, 2016. Id. Members of the public submitted 3,384 comments on the Draft EA, primarily opposing the project. See id. at 168.

28. DEQ issued its Final Environmental Assessment (“Final EA”) on July 26, 2017. The Final EA identifies an “agency-modified alternative,” which adopts Lucky’s proposal with slight modifications that, according to DEQ, will “address potential [environmental] impacts.” See Final EA at 21.

29. The Final EA does not, however, rationally evaluate some of the project’s most troubling impacts, or explain how measures included in the agency-modified alternative will ensure those impacts will not be significant. The Final EA also dismisses without any legitimate explanation project alternatives that could mitigate some of the potentially significant impacts DEQ identified.

A. Road Access Impacts

30. The EA acknowledges that Lucky would be required to improve the condition of roads—including Emigrant Creek Road and Forest Service roads—in order to access the planned exploration areas, but DEQ made no attempt to analyze the long-lasting impacts of Lucky's proposed road improvements to wildlife. DEQ's failure to disclose and evaluate these environmental impacts was arbitrary, capricious, and contrary to MEPA.

31. Numerous comments, including comments submitted by Montana Fish, Wildlife and Parks, raised concerns that road improvements could facilitate greater public access to remote areas in Emigrant Gulch, leading to greater disturbance of wildlife (particularly grizzly bears and wolverines) and potential conflicts between wildlife and humans even after the exploration project has concluded. DEQ dismissed these concerns:

The public currently has access to the base of the St. Julian Claim Block via Emigrant Creek Road and recreationists presently access the area to pursue recreational activities. The improvements to Emigrant Creek Road discussed above would not lead to access to higher elevations and more remote habitat, or additional fragmentation of wildlife habitat. Currently, a four-wheel drive high clearance vehicle is required to get to the St. Julian Claim Block. It is anticipated that the same type of vehicle will be required after Lucky Minerals makes the road improvements and completes its exploration activities.

Final EA at 188–89.

32. DEQ's resolution of this issue was irrational first because the EA is internally inconsistent with respect to the effect of road improvements. In some sections, the EA claims that Lucky's proposed improvements to the Emigrant Creek Road and Forest Service roads will not permit greater human access to the drainage, and therefore "there are not expected to be any significant secondary impacts to wildlife" due to road improvements. Final EA at 70. The EA's discussion of impacts to wolverines, however, contradicts this conclusion, stating that "[i]mprovements to the existing roads would facilitate an increase in motorized access and

hunter access into higher, more remote areas in the drainage.” Id. at 66. DEQ’s conclusion that road improvement will not affect wildlife is therefore not supported by DEQ’s own analysis.

33. Further, the EA’s prediction that “[t]he clearing and localized improvements to Emigrant Creek Road ... will not materially change its character of an unimproved forest road,” Final EA at 62, overlooks record evidence regarding the current and future condition of the road. Emigrant Creek Road is severely eroded in some areas and covered in rockfall in others. See Letter from GYC to Jen Lane, Re: Lucky Minerals, Inc. Proposed Exploration Project, at 13 (Dec. 12, 2016) (photographs documenting current road condition). The EA acknowledges that significant work will be required to make the road accessible to drilling equipment and other vehicles:

The approximate four-mile length of Emigrant Creek Road from Old Chico to the St. Julian Claim Block would be cleared of rock and debris within its original configuration, some of which would include hand picking. The road would not be widened. Emigrant Creek Road may be graded in localized areas in order to keep it serviceable for the type of vehicles that would be involved in the project.

Id. at 62. In short, Lucky’s proposed project would substantially improve the Emigrant Creek Road from its existing rugged condition. DEQ’s conclusion that road improvements will not permit more people to access remote areas deeper in the Emigrant drainage is therefore not supported by the record, and DEQ was required to evaluate and disclose the impacts of improved access before issuing Lucky an exploration license.

B. Wolverine Impacts

34. The Final EA is additionally flawed with respect to its conclusion that potential impacts from the exploration project to wolverines will not be significant. In the lower-48 United States, the wolverine is a rare and elusive resident of high mountain landscapes, including the Absaroka Mountains and Emigrant Peak. The largest terrestrial member of the weasel

family, wolverines are adapted to live in high-altitude and high-latitude ecosystems characterized by deep snow and cold temperatures. Deep snow is particularly important for wolverine reproduction, but wolverines of both sexes rely on these same cold, snowy areas year-round—areas that have become less and less prevalent as Montana winters have warmed. Wolverine reproduction is very slow—one study found that wolverines on average produced less than one kit per female per year—and any disruption of denning wolverines could threaten the persistence of local populations.

35. The EA acknowledges that exploration in Emigrant Gulch will be harmful to local wolverines: “The use of lights during nighttime drilling may also disrupt wolverine use of the area”; “The Proposed Action would represent a disturbance to wolverines and likely would deter wolverines from using the area”; “Copeland (1996) documented three instances when a female and her kits abandoned an area after researchers disturbed wolverines at maternal den sites”; “Given the low reproductive potential of wolverines (Weaver et.al., 1996), the impacts of improved access to more remote areas may be detrimental to regional populations”; “Improvements to the existing roads would facilitate an increase in motorized access and hunter access into higher, more remote areas in the drainage.” Final EA at 65–66.

36. The Final EA’s proposed mitigation does not address these impacts. The EA provides for “pre-exploration surveys prior to each field season to identify potential areas of western toad habitat, bat habitat, and nesting birds in areas of new disturbance on drill pads and laydown area.” but does not provide for a similar survey to detect wolverine presence or habitat use, despite evidence that wolverines may abandon den sites in response to human disturbance. Final EA at 69; see also id. at 56 (“The St. Julian Claim Block is within the home range distance for wolverines that have been documented in the area. However, specific knowledge of the

importance of the St. Julian Claim Block to the wolverines that use it is not known.”). DEQ’s failure to require Lucky to survey the area for wolverines is especially troubling, because Lucky has not disclosed the actual locations of its proposed drilling sites. See id. at 19 (“The locations of the proposed drill sites are conceptual and may change as new information is acquired.”). It is therefore impossible to determine based on the information that DEQ and Lucky have disclosed so far whether drilling will occur near areas of documented wolverine activity. The EA does call for Lucky to “reduce any unnecessary lighting,” id. at 69, but DEQ does not explain whether or how this vague measure will render the harm to wolverines due to “necessary” lighting insignificant. Further, the EA provides no mitigation to avoid or mitigate impacts caused by greater human access to high elevation areas in Emigrant Gulch used by wolverines, despite the EA’s acknowledgement that such impacts will occur.

37. Absent mitigation measures eliminating or significantly reducing the acknowledged impacts to wolverines, DEQ cannot rely on mitigation to conclude that these impacts will not be significant and thereby avoid preparing an EIS. DEQ’s alternative explanation—that the impacts of Lucky’s exploration project overall will be limited in extent and duration, Final EA at 167—does not support a finding that impacts to wolverines are insignificant, where DEQ’s own analysis indicates that even limited disturbance can cause wolverines to abandon maternal den sites, id. at 66. Further, wolverine impacts due to increased motorized access to upper Emigrant Gulch—including incidental trapping mortality due to increased access to wolverine habitat in the area for trappers of other species—could continue long after exploration has ended. In short, DEQ provided no rational explanation why wolverine impacts will not be significant.

C. Artesian Well Impacts

38. The EA further failed to rationally address potential discharges of poor-quality water from artesian boreholes in the project area to the surface waters in Emigrant Gulch. The EA acknowledges that “it is likely that Lucky Minerals would ... encounter artesian conditions during drilling.” Final EA at 118. DEQ states, however, that Lucky will “develop a mitigation plan to effectively contain flow from artesian boreholes during drilling” to address this potential impact. *Id.* at 119; *see id.* (“Containment of flow from an artesian borehole during the entire period of time it is producing water would prevent any potential discharge of water or sediment to surface waters or wetlands, prior to plugging and abandoning the drill hole in accordance with ARM 17.24.106.”).

39. DEQ may not, however, rely on a “plan to make a plan” to support a finding that impacts from artesian borehole discharges will not be significant. *See* Admin. R. Mont. 17.4.607(4) (allowing DEQ to rely on “design, or enforceable controls or stipulations or both imposed by the agency or other government agencies” to deem impacts insignificant) (emphasis added). MEPA requires DEQ to explain why proposed mitigation will prevent significant impacts to surface waters and wetlands from harmful artesian discharges, and DEQ cannot rationally do so without identifying what such mitigation will entail.

D. Secondary Impacts of Full-Scale Mine Development

40. In addition to DEQ’s deficient analysis of the exploration project’s direct impacts, DEQ failed altogether to examine the significant environmental consequences of its approval from the full-scale mining it could facilitate on both private and National Forest lands. Numerous commenters implored DEQ to evaluate the significant impacts of such mining to water quality, wildlife, recreation, and the local economy. In dismissing these comments out of

hand, DEQ stated, “[t]he proposed state action is issuance of an exploration license. The Environmental Assessment properly limits its analysis to impacts from the proposed exploration activity.” Final EA at 172.

41. To the contrary, MEPA requires DEQ to evaluate a project’s direct and secondary environmental impacts. Admin. R. Mont. 17.4.609(3)(d). Such secondary impacts include any “further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action.” Id. 17.4.603(18). Here, such secondary impacts include full-scale mine development, particularly where Lucky may seek to establish rights to minerals that underlay National Forest lands that are currently subject to the proposed federal mineral withdrawal by “angle drilling” into such federal minerals from Lucky’s patented mining claims. See Final EA at 35 (“The drill holes would be either vertical or angled holes that could extend 1,000 to 2,000 feet from the ground surface, depending on the observed geologic trends and the most effective approach to investigate the subsurface at each site.”). If Lucky were to establish existing rights to federal minerals through its exploration project, it would undermine the environmentally protective purposes of the proposed mineral withdrawal.

42. Although Lucky’s ability to establish rights to federal minerals is uncertain, such uncertainty counsels in favor of preparing an EIS. Protecting Paradise, slip. op. at 10–11 (EIS required “when ‘substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor’”) (citation omitted). At a minimum, DEQ was required to consider “the degree of uncertainty that the proposed action will have a significant impact on the quality of the human environment” in describing the environmental impacts of its decision. Admin. R. Mont. 17.4.609(2)(c). Because the consequences of full-scale mining are potentially severe, DEQ could not dismiss these impacts without “reasonable

assurance" they will not occur. Id. 17.4.608(1)(b). DEQ's environmental review failed to meet these standards.

E. DEQ's Range of Alternatives

43. DEQ further violated MEPA by summarily rejecting two alternatives that would have reduced the extent of the exploration project's environmental impacts. MEPA's alternatives requirement ensures that agencies consider alternatives to a proposed project that will accomplish the project's goals while causing fewer environmental impacts. See Mont. Code Ann. § 75-1-201(1)(b)(v) (agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources.").

44. The first dismissed alternative would have limited Lucky's exploration license to one field season. The second would have eliminated night drilling. DEQ dismissed these alternatives because, according to DEQ, they would both cause similar impacts to Lucky's proposal. If Lucky were obliged to complete its exploration in one field season, it would, according to DEQ, simply double the intensity of drilling, using "four, rather than two, drill rigs." Final EA at 26. If night drilling were prohibited, Lucky would, according to DEQ, extend exploration "for an additional three or four field seasons." Id. at 27.

45. DEQ's analysis, however, assumes that Lucky could not reduce the number of holes it will drill. DEQ conducted no independent evaluation of whether Lucky could feasibly reduce the scale of its exploration project, writing that "DEQ has no basis to second-guess Lucky Minerals [sic] need to conduct drilling at all of the proposed locations." Final EA at 300. However, MEPA does not permit DEQ to reject potentially reasonable project alternatives by blindly relying on a project applicant's claim about the necessary scope of its project. See Mont.

Code Ann. § 75-1-201(b)(iv)(C)(I) (agency must consider project alternatives that are "economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor"); id. § 75-1-201(b)(iv)(C)(II) ("the agency proposing the alternative shall consult with the project sponsor regarding any proposed alternative, and the agency shall give due weight and consideration to the project sponsor's comments regarding the proposed alternative").

F. DEQ's No-Significant-Impact Finding

46. Despite the project's acknowledged impacts, and based on the irrational analysis and conclusions described above, DEQ concluded that the project will not have significant environmental impacts and, therefore, no EIS was required. Final EA at 168. However, as discussed, DEQ failed to evaluate the impacts of the project's proposed road improvements or explain why those impacts will not be significant. As to wolverines, DEQ acknowledged impacts to wolverines, but did not rationally explain why those impacts will not be significant, or how DEQ's wildlife mitigation measures will protect wolverines from significant impacts.

47. With respect to artesian discharges, DEQ stated only that Lucky will develop a mitigation plan at some point in the future; DEQ gave no clue as to what that mitigation plan will contain. DEQ cannot rely on a speculative mitigation plan to conclude that impacts from artesian discharges will not be significant.

48. Further, DEQ did not even evaluate the secondary environmental impacts of exploratory drilling, which may give rise to full-scale mine development on National Forest land currently subject to a federal withdrawal proposal, let alone justify why such impacts are not significant.

49. Because DEQ failed to justify its determination that the project will not cause significant impacts, DEQ's failure to prepare an EIS was arbitrary, capricious, and contrary to MEPA.

FIRST CAUSE OF ACTION

(Failure to Evaluate Impacts Due to Road Improvements, Mont. Code Ann. § 75-1-201)

50. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 49.

51. Under MEPA, DEQ is required to "take a 'hard look' at the environmental impacts of a given project or proposal." Mont. Wildlife Fed'n, ¶ 43. This "hard look" must include an evaluation of all of the project's direct, indirect, and cumulative environmental impacts. Mont. Code Ann. 75-1-201(1)(b)(iv)(A); Admin. R. Mont. 17.4.609(3)(d).

52. DEQ, however, failed to disclose and evaluate the impacts of improvements to the Emigrant Creek Road and connected Forest Service roads, which will facilitate human access to the drainage and increase harassment of wildlife and conflicts between humans and wildlife in this sensitive area.

53. The Final EA is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

SECOND CAUSE OF ACTION

(Failure to Rationally Evaluate Impacts to Wolverines, Mont. Code Ann. § 75-1-201)

54. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 53.

55. MEPA and its implementing regulations require DEQ to evaluate all of the direct, secondary, and cumulative environmental impacts of a proposed project. Mont. Code Ann. 75-1-201(1)(b)(iv)(A); Admin. R. Mont. 17.4.609(3)(d). In conducting this analysis, DEQ must "examine the relevant data and articulate a satisfactory explanation for its action, including a

rational connection between the facts found and the choice made.” Mont. Wildlife Fed’n, ¶ 43 (quoting Clark Fork Coal., ¶ 47).

56. DEQ, however, failed to rationally explain its conclusions concerning the impacts the proposed exploration project will have on wolverines. Although DEQ acknowledges the risk of harm to wolverines from Lucky’s exploration activities, including potential impacts to denning and reproduction, the Final EA does not rationally explain why these impacts are not significant or how DEQ’s proposed mitigation will prevent or reduce these impacts.

57. The Final EA is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

THIRD CAUSE OF ACTION
(Failure to Rationally Evaluate Impacts from Artesian Wells, Mont. Code Ann. § 75-1-201)

58. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 57.

59. MEPA and its implementing regulations require DEQ to evaluate all of the direct, indirect, and cumulative environmental impacts of a proposed project. Mont. Code Ann. 75-1-201(1)(b)(iv)(A); Admin. R. Mont. 17.4.609(3)(d). In conducting this analysis, DEQ must “examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” Mont. Wildlife Fed’n, ¶ 43 (quoting Clark Fork Coal., ¶ 47).

60. DEQ, however, failed to rationally address impacts from artesian wells, which DEQ expects Lucky will encounter while drilling in the project area. Rather than explain how Lucky will address artesian discharges at the project site, the Final EA provides that Lucky will prepare a mitigation plan at a future time to address those impacts. DEQ cannot rely on a hypothetical mitigation plan to support its conclusion that artesian well impacts will not be significant. See Admin. R. Mont. 17.4.607(4) (allowing DEQ to rely on “design, or enforceable

controls or stipulations or both imposed by the agency or other government agencies” to deem impacts insignificant) (emphasis added).

61. The Final EA is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

FOURTH CAUSE OF ACTION
(Failure to Evaluate Secondary Impacts of Full-Scale Mining, Mont. Code Ann. § 75-1-201)

62. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 61.

63. MEPA requires DEQ to evaluate a project’s secondary environmental impacts, Mont. Code Ann. 75-1-201(1)(b)(iv)(A); Admin. R. Mont. 17.4.609(3)(d), which include “impact[s] to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action,” Admin. R. Mont 17.4.603(18).

64. Here there are “substantial questions” regarding the potentially significant secondary impacts of full-scale mine development on private lands and National Forest lands that are subject to a federal withdrawal proposal. Protecting Paradise, slip. op. at 10–11. In particular, Lucky may seek to use its exploration project on private lands to establish mining rights on adjacent public lands that would exempt its future mining activities from the effect of the federal withdrawal. While Lucky’s ability to do so is uncertain, the environmental consequences would be severe. Rather than evaluate these impacts or the likelihood they will occur, as MEPA requires, DEQ dismissed them out of hand.

65. The Final EA is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

FIFTH CAUSE OF ACTION
(Failure to Evaluate a Reasonable Range of Alternatives, Mont. Code Ann. § 75-1-201)

66. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 65.

67. Under MEPA, DEQ is required to consider reasonable alternatives to the proposed project. Mont. Code Ann. § 75-1-201(1)(b)(v). This requirement ensures that DEQ considers all of its options, including options that may cause less harm to the environment, before deciding whether to approve a proposed project. See id.

68. DEQ failed to evaluate reasonable alternatives that would have reduced the scope of the proposed project and, accordingly, its impacts.

69. DEQ dismissed these alternatives based solely on Lucky's unsubstantiated assertions that it must drill a specific number of boreholes. In doing so, DEQ failed to independently evaluate the feasibility of reducing the scale of the project, as required by MEPA. See Mont. Code Ann. § 75-1-201(b)(iv)(C)(I) (agency must consider project alternatives that are "economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor")

70. The Final EA is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

SIXTH CAUSE OF ACTION (Failure to Complete an EIS, Mont. Code Ann. § 75-1-201)

71. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 70.

72. Under MEPA, if DEQ determines that a project may have any significant impacts, it must prepare an EIS. Mont. Code Ann. § 75-1-201(1)(b)(iv).

73. As discussed above, DEQ has not rationally explained why acknowledged impacts to wildlife, including wolverines, impacts to water quality, or the consequences of full-scale mining are not significant, nor has DEQ explained how its proposed mitigation measures will eliminate otherwise significant impacts.

74. DEQ therefore acted arbitrarily and capriciously in approving the proposed exploration project without preparing an EIS or providing a rational explanation why an EIS is not required.

75. The Final EA is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

SEVENTH CAUSE OF ACTION
(Unconstitutionality of Mont. Code Ann. § 75-1-201(6)(c), (d) – Clean and Healthful Environment)

76. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 75.

77. The State's constitutional obligation to prevent unreasonable environmental degradation under article II, section 3 and article IX, section 1 of Montana's Constitution is expressly implemented by MEPA, Mont. Code Ann. § 75-1-102, which promotes a healthy environment by requiring state agencies to thoroughly evaluate the environmental consequences of activities they permit before those activities occur.

78. Allowing Lucky's exploration project to commence before DEQ thoroughly and reasonably evaluates the project's environmental harm under MEPA would implicate Plaintiffs' fundamental right to a clean and healthful environment. Mont. Const. art. II, § 3.

79. The Montana Legislature amended MEPA in 2011 to provide that the sole remedy for MEPA noncompliance is a remand to the agency. Mont. Code Ann. § 75-1-201(6)(c); 2011 Mont. Laws ch. 396 (SB 233). As MEPA is currently written, "[a] permit, license, lease, or other authorization issued by an agency is valid and may not be enjoined, voided, nullified, revoked, modified, or suspended pending the completion of an environmental review that may be remanded by a court." Mont. Code Ann. § 75-1-201(6)(d).

80. Because Montana Code Annotated sections 75-1-201(6)(c) and (d) would permit unexamined environmental harm, they impair Plaintiffs' fundamental constitutional rights and are subject to strict judicial scrutiny. Mont. Const., art. II, § 3, art. IX, § 1.

81. Because the record before the 2011 Legislature did not demonstrate any compelling state interest for stripping Montana courts of their authority under MEPA to prevent environmental harm, Montana Code Annotated sections 75-1-201(6)(c) and (d) are unconstitutional as applied to this case. Mont. Const., art. II, § 3, art. IX, § 1.

EIGHTH CAUSE OF ACTION
(Unconstitutionality of Mont. Code Ann. § 75-1-201(6)(c), (d) – Public Participation)

82. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 81.

83. Montana Code Annotated sections 75-1-201(6)(c) and (d) also violate Plaintiffs' constitutional right to reasonable public participation prior to the agency's final decision. Mont. Const., art. II, § 8.

84. Under the Legislature's 2011 MEPA amendments, Lucky's exploration project may commence before DEQ has undertaken a lawful analysis of the project's significant environmental impacts and alternatives to lessen those impacts, and importantly, before the public has had a meaningful opportunity to evaluate and comment on DEQ's revised analysis. See Mont. Code Ann. § 75-1-201(6)(c) (providing that an authorization issued by an agency may not be revoked or suspended "pending the completion of an environmental review that may be remanded by a court").

85. Because Montana Code Annotated sections 75-1-201(6)(c) and (d) would foreclose meaningful public participation before DEQ's decision to authorize mineral exploration was made and implemented, they impair Plaintiffs' fundamental constitutional rights and are subject to strict judicial scrutiny. Mont. Const., art. II, § 8.

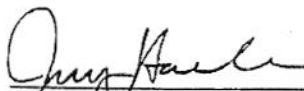
86. Because the record before the 2011 Legislature did not demonstrate any compelling state interest for stripping Montana courts of their authority under MEPA to prevent environmental harm, Montana Code Annotated sections 75-1-201(6)(c) and (d) are unconstitutional as applied to this case. Mont. Const., art. II, § 8.

REQUEST FOR RELIEF

THEREFORE, Plaintiffs respectfully request that this Court:

1. Declare unlawful and set aside DEQ's July 26, 2017 EA evaluating mineral exploration in Emigrant Gulch;
2. Order DEQ to conduct a new environmental analysis that complies with MEPA;
3. Declare unlawful and vacate the exploration license permitting Lucky Minerals to conduct mineral exploration in Emigrant Gulch;
4. Declare that Montana Code Annotated sections 75-1-201(6)(c) and (d) violate Montana Constitution article II, section 3 and article IX, section 1, as applied to this case.
5. Declare that Montana Code Annotated sections 75-1-201(6)(c) and (d) violate Montana Constitution article II, section 8, as applied to this case.
6. Grant temporary and/or permanent injunctive relief prohibiting the proposed mineral exploration; and
7. Grant Plaintiffs such additional relief as the Court may deem just and proper.

Respectfully submitted this 1st day of June, 2018.



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*Counsel for the State of Montana and
Office of the Attorney General*

MONTANA SIXTH JUDICIAL DISTRICT COURT
PARK COUNTY

PARK COUNTY ENVIRONMENTAL
COUNCIL and GREATER
YELLOWSTONE COALITION,

Plaintiffs,

v.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY and
LUCKY MINERALS, INC.,

Defendants.

Cause No. DV-17-126

**SPECIAL APPEARANCE OF
THE OFFICE OF THE
ATTORNEY GENERAL AND
STATE OF MONTANA**

On May 21, 2018, the Office of the Attorney General received a document titled "Plaintiff's Conditional Notice of Constitutional Question" ("Conditional Notice"), stating that the Plaintiffs "may challenge" the constitutionality of Mont. Code Ann. § 75-1-201(6)(c) and (d). The *original* Complaint was served

with the Conditional Notice; however, the subsequent Amended Complaint asserting a constitutional question was not.

The purpose of this Special Appearance is to notify the Court and counsel that the Plaintiffs' Conditional Notice does not comport with Rule 5.1 of the Montana Rules of Civil Procedure. As such, it has no force or effect; it is a nullity not authorized by law. Rule 5.1(a) provides:

A party that files a pleading, written motion, or other paper challenging the constitutionality of a state statute ***must promptly file a notice of constitutional question*** stating the question and identifying the paper that raises it, ***and serve the notice and paper on the state attorney general*** either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

(Emphasis added.)

First, the Conditional Notice was filed prematurely, before the Plaintiffs had decided whether to challenge the constitutionality of Mont. Code Ann. § 75-1-201(6)(c) and (d). See Conditional Notice at 1 (stating that the Plaintiffs "may" challenge the constitutionality of the statute). Second, the Plaintiffs failed to serve their Amended Complaint with the Conditional Notice, as expressly mandated by Rule 5.1. Moreover, the Rule also reflects that Plaintiffs' erroneous assumption that formal notice to the Attorney General is unnecessary because

the Department of Environmental Quality is a party (see Conditional Notice at 2, n.1) is demonstrably incorrect.¹

As the Court has ordered the filing of the Amended Complaint, it is now incumbent upon the Plaintiffs to comply with the law and serve the Attorney General with a legally sufficient Rule 5.1 Notice and a copy of the Amended Complaint. The Attorney General will then have 60 days from service of such Notice within which to decide whether to intervene. See Mont. R. Civ. P. 5.1(b). Before the 60-day time to intervene expires, the Court may reject the constitutional challenge, but may not enter judgment holding the statute unconstitutional. Id.

In summary, the Attorney General does not, and indeed cannot, recognize the validity of Plaintiffs' Conditional Notice of Constitutional Question dated May 17, 2018.

Respectfully submitted June 21, 2018.

TIMOTHY C. FOX
Montana Attorney General

By: 
ROB CAMERON
Deputy Attorney General

¹ Perhaps Plaintiffs' confusion arises from the fact that prior to 2011, under M.R.Civ.P. 24(d) the requirement to serve the Attorney General arose only when "neither the state nor any agency or any officer or employee thereof" was a party. In 2011, the Montana Supreme Court abolished Rule 24(d) and replaced it with Rule 5.1 which requires plaintiffs to serve the Attorney General in all cases involving a constitutional challenge to a statute regardless of whether another State agency is a party.

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2018, a true and correct copy of the foregoing document was served by deposit in the U.S. Mail, First Class and postage prepaid, and addressed as follows:

Jenny K. Harbine
Joshua R. Purtle
Earthjustice
313 East Main Street
Bozeman, MT 59715

C. Edward Hayes
Special Assistant Attorney General
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

KD Feeback
Toole & Feeback, PLLC
702 Main Street
P.O. Box 907
Lincoln, MT 59639-0907

DATED: June 21, 2018



1 HON. BRENDA R. GILBERT
2 District Judge
3 Sixth Judicial District
4 414 East Callender Street
5 Livingston, Montana 59044
6 406-222-4130

RECEIVED

JUL 02 2018

ATTORNEY GENERAL'S OFFICE
HELENA, MONTANA

PARK COUNTY CLERK
OF DISTRICT COURT
JUNE 29 2018

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FILED
BY *June Rule*
DEPUTY

7 MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

8 PARK COUNTY ENVIRONMENTAL)
9 COUNCIL and GREATER)
10 YELLOWSTONE COALITION,)

11 Plaintiffs,)

12 vs.)

13 MONTANA DEPARTMENT OF)
14 ENVIRONMENTAL QUALITY and)
15 LUCKY MINERALS, INC.,)

16 Defendants.)
17)
18)
19)
20)
21)
22)
23)
24)
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27)
28)

CAUSE NO. DV 17-126

ORDER REGARDING PROCEDURE
REQUIRED UPON CHALLENGE
TO CONSTITUTIONALITY OF
STATUTE

29 The Court has reviewed Plaintiffs' Conditional Notice of Constitutional Question, the
30 Special Appearance of the Office of the Attorney General and State of Montana, the Plaintiffs'
31 Response to Special Appearance of the Office of the Attorney General and State of Montana, and
32 the Requirements of Rule 5.1, M.R.Civ. P. Good causes exists for the following order, which
33 clarifies the procedural requirements for a constitutional challenge to a statute, as applied to the
34 documents filed in this case.

35 The Requirements of Rule 5.1, M.R.Civ. P.

36 The requirements of Rule 5.1, entitled, "Constitutional Challenge to a Statute — Notice and
37 Intervention", are set forth as follows:
38

- 1 (a) Notice by a Party. A party that files a pleading, written motion, or other paper
2 challenging the constitutionality of a state statute must promptly file a notice of
3 constitutional question stating the question and identifying the paper that raises
4 it, and serve the notice and paper on the state attorney general either by certified
5 or registered mail or by sending it to an electronic address designated by the
6 attorney general for this purpose.
- 7 (b) Intervention; Final Decision on the Merits. Unless the court sets a later time, the
8 attorney general may intervene within 60 days after the notice is filed or after the
9 court certifies the challenge, whichever is earlier. Before the time to intervene
10 expires, the court may reject the constitutional challenge, but may not enter a
11 final judgment holding the statute unconstitutional.
- 12 (c) No Forfeiture. A party's failure to file and serve the notice, or the court's failure
13 to certify, does not forfeit a constitutional claim or defense that is otherwise
14 timely asserted.

15 Procedural History

16 Plaintiffs' Complaint was filed on September 22, 2017. This original Complaint does not
17 set forth a cause of action regarding a constitutional challenge to any statute. On May 17, 2018, the
18 Plaintiffs filed Plaintiffs' Conditional Notice of Constitutional Question, (hereafter, "Conditional
19 Notice"). Therein, the Attorney General was notified that

20 "Plaintiffs Park County Environmental Council and Greater
21 Yellowstone Coalition may challenge the constitutionality of Montana
22 Code Annotated sections 75-1-201(6)(c) and (d), provisions of the
23 Montana Environmental Policy Act ("MEPA") that restrict the
24 Court's equitable power to prevent environmental harm pending the
25 State's MEPA compliance. Mont. Code Ann. § 75-1-201(6)(c)(d),
26 (providing that sole remedy for MEPA compliance is remand to the
27 agency, and an "authorization issued by an agency is valid and may
28 not be enjoined, voided, nullified, revoked, modified, or suspended.")

29 The Conditional Notice goes on to explain the pending challenge to DEQ's decision to grant
30 an exploration license to Lucky Minerals. The Conditional Notice further represents that, "in the
31 event this Court finds that DEQ failed to evaluate significant environmental harm caused by mineral

1 exploration, Plaintiffs intend to amend their complaint” to specifically allege that MEPA’s remedial
2 restrictions violate the Montana Constitution. In the Conditional Notice, Plaintiffs represent that the
3 State was notified of their intent to challenge the constitutionality of MEPA’s remedial restrictions
4 during oral argument on the summary judgment motions herein. By footnote in the Notice,
5 Plaintiffs contend that formal notice to the Attorney General under Rule 5.1(a) M.R.Civ.P is not
6 required because the State is a party.
7

8 Plaintiffs made clear they were providing the Conditional Notice because Lucky Minerals
9 intends to begin exploration activities as soon as July 15, 2018. The Conditional Notice was
10 provided to the Attorney General with a copy of the original Complaint and was further provided to
11 counsel of record herein.
12

13 This Court entered a Decision on May 23, 2018, finding that the DEQ violated the
14 requirements of MEPA in the analysis that led to it granting Lucky Minerals its exploration license.
15 The Court entered an Order setting aside the Final Environmental Assessment for the Lucky
16 Minerals Exploration Project and remanded the matter to the Montana Department of
17 Environmental Quality for further environmental review consistent with the Court’s May 23, 2018
18 Decision.
19

20 Plaintiffs filed their Motion for Leave to Amend Complaint and Plaintiffs’ Motion for
21 Vacatur of Exploration License on June 1, 2018. On June 18, 2018, the Court entered an Order
22 Granting Plaintiffs’ Motion to Amend Complaint and directing the Clerk of Court to file the First
23 Amended Complaint that was lodged in the Court file upon Plaintiffs’ filing of their Motion to
24 Amend. Thus, Plaintiffs’ First Amended Complaint for Declaratory and Injunctive Relief was filed
25 on June 18, 2019.
26
27
28

1 Plaintiff's First Amended Complaint, as its Seventh Cause of Action, sets forth a claim
2 alleging that Mont. Code Ann. § 75-1-201(6)(c), (d) is unconstitutional.

3 **The Parties' Positions**

4 The Attorney General filed a Special Appearance of the Office of the Attorney General and
5 State of Montana on June 21, 2018. In its Special Appearance, the Attorney General represents that
6 the Plaintiffs' original Complaint was served with the Conditional Notice, but that the subsequent
7 Amended Complaint asserting a constitutional question was not. The Attorney General points out
8 that the Conditional Notice was filed before Plaintiffs decided to challenge the constitutionality of
9 the MEPA remedial restriction and was premature.
10

11 The Attorney General disagrees with Plaintiffs' representation that service on the Attorney
12 General is not required where the State is already a party to the case. The Attorney General
13 maintains that the Plaintiffs' Conditional Notice does not comport with Rule 5.1 and has no force
14 and effect.
15

16 In Plaintiffs' Response to the Special Appearance of the Attorney General, Plaintiffs argue
17 that they have complied with Rule 5.1, that the Attorney General has had actual notice, and that the
18 Attorney General's position would create an unacceptable delay that would impair Plaintiffs'
19 environmental rights. Plaintiffs maintain that their Conditional Notice was sufficient, and was
20 provided to give sufficient notice to allow the Attorney General to respond by July 16, 2018.
21

22 **Application of the Requirements of Rule 5.1**

23 The plain language of Rule 5.1 (a) requires that, "[a] party that files a pleading, written
24 motion, or other paper challenging the constitutionality of a state statute must promptly file a
25 notice of constitutional question stating the question and identifying the paper that raises it, and
26
27
28

1 serve the notice and paper on the state attorney general.” The notice and the paper raising the
2 constitutionality of the statute must be served on the attorney general. The Court has no discretion
3 to contravene the plain language of this Rule.
4

5 The Attorney General states, and Plaintiffs have not denied, that Plaintiffs did not serve
6 their Amended Complaint on the Attorney General. This is, “the paper raising the constitutionality
7 of the statute” and it must be served on the Attorney General. Such service starts the sixty day time
8 frame that the Attorney General has to intervene as to the constitutional challenge.
9

10 The Conditional Notice that was provided to the Attorney General on or about May 17,
11 2018, was ineffective to put the Attorney General on notice that it had a constitutional challenge to
12 address. The reason it was ineffective is because it was conditional and because it was not
13 accompanied by “the paper raising the constitutionality of the statute”, as required by Rule 5.1(a).
14

15 The Court recognizes that Plaintiffs’ provision of the Conditional Notice was done in an
16 effort to jump start the sixty day time frame to intervene to which the Attorney General is entitled.
17 However, there is no discretion on the part of the Court that would allow for deviation from the
18 plain language of the Rule.

19 The fact that a possible constitutional challenge to the statute was also mentioned by
20 Plaintiffs’ counsel during oral argument on the summary judgment motions does not suffice as
21 notice either. The Attorney General correctly points out that when Rule 24(d), M.R. Civ. P. was
22 abolished by the Montana Supreme Court in 2011, and replaced by Rule 5.1, the requirement was
23 established for the Attorney General to be served in all cases involving a constitutional challenge to
24 a statute regardless of whether another State agency is a party.
25
26
27
28

1 Because the requirements of Rule 5.1 M.R. Civ. P have not been met, the Court must
2 vacate the hearing scheduled for July 10, 2018 for oral argument regarding Plaintiffs' Motion for
3 Vacatur.

4 DATED this 39th day of July, 2018.
5

6
7 
8 BRENDA R. GILBERT, District Court Judge
9

10 cc: Jenny K. Harbine sent via email and US Mail
11 Joshua R. Purtle sent via email and US Mail
12 C. Edward Hayes / John F. North sent via email and US Mail
13 KD Feeback sent via email and US Mail
14 Rob Cameron, Attorney General's Office sent via email and US Mail.

} MLD
6-29-18
JL